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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Time Corporation ("General Time"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in Docket No. 32792 on November 19, 1968.

Opinions Below

The opinion of the Court of Appeals is not as yet officially reported, but is printed as Appendix A hereto.

The final judgment of the United States District Court for the Southern District of New York, entered November 4, 1968, is printed as Appendix B hereto.*

Jurisdiction

The Judgment of the Court of Appeals affirming the final judgment of the District Court was entered on November 19, 1968 and is printed as Appendix C hereto. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

Questions Presented

By enacting §17(d) of the Investment Company Act of 1940 (the "Act"), Congress expressly proscribed joint transactions involving mutual funds and their affiliates "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."

In this case, the Securities and Exchange Commission (the "Commission") held, after a full evidentiary hear-

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* The first decision of the District Court in this case is reported in 286 F. Supp. 50 (S. D. N. Y. 1968). On July 31, 1968 that decision was reversed by the Second Circuit, 399 F. 2d 396 (2d Cir. 1968), but that Court refused to direct the entry of the relief sought by the Securities and Exchange Commission and General Time, and General Time immediately petitioned this Court for a writ of certiorari (pending in Docket No. 512) to review that decision which raised questions "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945). Any doubts as to the finality of the questions presented by that Petition were resolved when the Court of Appeals handed down its second decision in this case, final for all purposes, on November 19, 1968 (Appendix A hereto), which affirmed the final judgment of the District Court entered following the remand of the case to it by the July 31, 1968 decision of the Court of Appeals.

ing, that a mutual fund (respondent American Investors Fund, Inc.) and its affiliate (respondent Talley Industries, Inc.) had violated the Act by engaging in a joint transaction to acquire the stock of a portfolio company of the fund (General Time) for the ultimate purpose of enabling the affiliate to take control of that portfolio company, in contravention of the Commission's Rule 17d-1.

Notwithstanding the Commission's holding, the mutual fund and its affiliate continued their unlawful joint transaction by voting their unlawfully acquired General Time stock to consummate the takeover. The Commission thereupon brought suit in the District Court to protect its primary jurisdiction under the Act, and sought, *inter alia*, to prevent certification of those votes unless and until the Commission first passed upon and approved that aspect of the continuing joint transaction as required by its Rule 17d-1. On July 31, 1968, the Court of Appeals upheld the Commission's previous formal determination that the Act had been violated. The Court below, however, effectively nullified the Commission's determination and usurped its exclusive jurisdiction under the Act, by judicially sanctioning the consummation of the joint transaction, and by directing the District Court not to grant the relief sought by the Commission. Upon appeal from the remanded proceedings of the District Court, the Court of Appeals on November 19, 1968 confirmed its earlier decision, and also held that General Time (an affiliate and portfolio company of a mutual fund) did not have standing to challenge violations of the Act.

The following questions are presented:

1. Whether the Court of Appeals (a) improperly refused to defer to the exclusive and primary jurisdiction of the Commission to review and approve or disap-

prove joint transactions under the Act, and (b) exceeded its authority by itself sanctioning and approving such joint transactions in derogation of the Congressionally delegated regulatory functions of the Commission.

2. Whether the Court of Appeals, by denying General Time standing to sue, standing to appeal from an adverse lower court judgment, and standing to elicit proof, has established an overly-restrictive, novel and improper standard which is in conflict with principles enunciated by this Court and which will deprive aggrieved parties, having a substantial personal stake in the outcome, of their fundamental right to be heard.

Statute Involved

The relevant portions of the Investment Company Act of 1940, §§1, 2(a)(3), 17(d), 38(a), 42(e), 43(a); 15 U.S.C. §§80a-1, 80a-2 (a) (3), 80a-17(d), 80a-37(a), 80a-41(e), 80a-42(a); and Rule 17d-1, 17 C.F.R. 270.17d-1, are set forth in Appendix D hereto.

Statement of the Case

1. Summary of Proceedings Leading to Petition in Docket No. 512

General Time's Petition in Docket No. 512 discusses in detail the developments in this case through the Court of Appeals' first opinion of July 31, 1968. For the Court's convenience, those developments are summarized here.

On April 19, 1968, the Commission held that Talley Industries, Inc. ("Industries") and American Investors Fund, Inc. ("Fund") had acquired substantial blocs of General Time stock (22% of the total then outstanding) in a secret, coordinated and joint scheme to effectuate a

takeover of General Time in violation of §17(d) of the Act and the Commission's Rule 17d-1 (Appendix D to Petition in Docket No. 512).* The Commission's holding was disregarded by Industries and Fund when they proceeded to vote their unlawfully acquired General Time stock to elect a slate of directors selected, sponsored and financed by Industries. The Commission thereupon brought suit in the District Court for injunctive relief to protect its jurisdiction and review powers under the Act, and to enforce compliance with its decision. The District Court dismissed the action on the ground that the Act had not been violated (Appendix B to Petition in Docket No. 512).

Upon appeal, the Court of Appeals, in an opinion issued on July 31, 1968 (sometimes hereinafter referred to as the "July opinion"), upheld the Commission's determination of a violation, reversed the dismissal and remanded the case to the District Court to formulate an injunction consistent with that opinion (Appendix A to Petition in Docket No. 512). However, the July opinion also determined that the relief sought by the Commission—either to compel respondents to seek Commission approval, as required under §17(d) and Rule 17d-1, of their further joint transaction to vote their unlawfully acquired stock and complete their takeover, or to enjoin that joint transaction as the fruit of their unlawful ac-

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* The Commission's formal determination of April 19, 1968 resulted from a belated application filed by Industries and Fund with the Commission on March 26, 1968, seeking *nunc pro tunc* Commission approval of their joint transaction to acquire General Time stock. That determination was preceded by a full evidentiary hearing before the Commission on April 16, 17 and 18, 1968, in which General Time, Industries and Fund participated.

quisition of stock—was inappropriate.* At that point, General Time filed its Petition in Docket No. 512.

2. District Court Proceedings Upon Remand

Upon remand from the Court's July decision, the Commission submitted to the District Court a proposed final judgment, with which General Time concurred, in support of the Commission's delegated jurisdiction under the Act. That proposed judgment provided in part for the withdrawal of the votes cast by Industries and Fund at the General Time Annual Meeting, unless and until they applied to the Commission and received its approval to vote as required by §17(d) and Rule 17d-1. The Commission stated to the District Court that:

> "A decree such as we propose, which prohibits Talley [Industries] and the Fund from 'taking over' General Time without approval by the Commission, is necessary to stop a continuing violation of Section 17(d)." (Memorandum of the Securities and Exchange Commission in Support of Its Proposed Final Judgment of Permanent Injunction, p. 3)
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> ". . . it is for the Commission, rather than for this Court, to determine whether such transaction, or any aspect of it, should be approved. Conse-

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* The Commission's complaint of May 1, 1968 set forth the Commission's determination that Industries and Fund had violated the Act by reason of their joint acquisition program, and alleged that Industries and Fund were continuing "to engage in unlawful" transactions by voting at General Time's annual meeting, notwithstanding Commission disapproval of that program. The Commission requested, *inter alia*, relief which would have enjoined Industries and Fund from participating in such transactions "without first having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having first been granted by order of said Commission." (Complaint, p. 4 ¶ (1)).

> quently, for this Court to determine whether or not Talley [Industries] and the Fund should be permitted to take over General Time without the approval of the Commission would be, in the words of the Supreme Court, 'an unwarranted incursion into the administrative domain.' *Securities and Exchange Commission* v. *New England Electric System,* 390 U.S. 207, 211 (1968)." (*Id.* at 5)

The District Court not only rejected the Commission's proposed judgment, but also refused to hold an evidentiary hearing as requested by General Time, with the support of the Commission, to ascertain the facts necessary to determine appropriate relief.*

The District Court's final judgment ordered General Time to reconvene its annual meeting and to count the votes cast by Industries and Fund in favor of Industries' slate of directors, although these votes represented unlawfully acquired stock, and were the principal means for consummating the unlawful joint transaction. That final judgment by-passed the Commission's procedures and powers under the Act by giving judicial sanction to a continuing joint transaction which, as the Commission properly argued, could only be initially reviewed and approved or disapproved under the Act upon application to the Commission.

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* Although stating in advance that it would be summarily rejected, the District Court gave General Time one day to prepare and present an offer of proof. The Court of Appeals stated in respect thereof merely that the District Court ". . . allowed [General Time's] counsel to make an extensive offer of proof." (Appendix A, p. 5a) The Court of Appeals' opinion did not consider the summary rejection of such offer, its contents, or the Commission's support in respect thereof. See also footnote at page 11, *infra*.

3. Proceedings on Appeal from the District Court's Final Judgment and the Court of Appeal's Opinion of November 19, 1968

On October 8, 1968, General Time appealed from the final judgment of the District Court. General Time argued to the Court of Appeals, and its position was supported by the Commission, that the District Court was required to defer to the Commission's exclusive primary jurisdiction (a) to protect the integrity of the Congressionally delegated regulatory functions of the Commission to pass upon joint transactions, and (b) to utilize the Commission's expertise in overseeing joint activities of mutual funds and their statutory affiliates.

By opinion of November 19, 1968 (sometimes hereinafter referred to as the "November opinion"), the District Court's final judgment was affirmed by the Court of Appeals.

In that decision, the Court below recognized that the question "of the proper relation of court and agency in the enforcement of the Investment Company Act" was "by no means an unimportant one." (Appendix A, p. 10a)

By resolving this question in favor of the judiciary, the Court usurped and negated the Commission's exclusive jurisdiction to review and approve under §17(d) and Rule 17d-1 the continuation and consummation (by voting) of the unlawful joint transaction. Without addressing itself to the paramount point that Congress had ordered the Commission to judge such matters in the first instance, the Court noted that if the case were remanded to the Commission, a number of results might occur—including the Commission's administrative refusal to approve Industries' and Fund's joint transaction to vote their stock. It rationalized that if the Commission "were to deny the application—perhaps, as intimated in its brief, on the ground of 'the previous vio-

lation of the Act' "—respondents might "tire of the game" and General Time might succeed in preventing the takeover. (Appendix A, p. 10a)

The Court of Appeals then proceeded, without citation of authority, to sanction the violation, by attempting to isolate takeover transactions from the prohibitions of §17(d):

> ". . . §17(d) does not aim to prevent an affiliate and an investment company from jointly acquiring control of another company *simpliciter;* it seeks only to prevent their doing this on a basis wherein the investment company fares worse than the affiliate." (Appendix A, p. 13a)

Exercising the judgment legislatively reserved exclusively to the Commission, the Court held that the joint transaction in this case posed no threat to the Fund's interests. This determination was based upon its speculative belief that it is:

> ". . . hard to perceive how the Commission could find that voting by an affiliate and an investment company under democratic election rules would amount to participation by the investment company 'on a basis different from or less advantageous than' the affiliate." (Appendix A, pp. 9a-10a)

The Court thus contradicted its July opinion, in which it upheld the importance and efficacy of the Commission's Rule 17d-1 advance disclosure, application and prior approval procedures, and recognized the Commission's primary and exclusive role in determining the legality of joint transactions before their initiation:

> "The varieties in which participation by an investment company may be 'different from or less

> advantageous than that' of an affiliate are infinite. The Commission could well have concluded that an attempt to specify these might fail to accomplish the Congressional purpose in some instances and in others accomplish more than Congress desired, and that the only effective method of regulation was to require advance disclosure and individual decision, at least until a pattern emerged . . . Furthermore, as the Commission points out in brief, the public notice and opportunity for interested persons to come forward provided by the application procedure may lead to the development of significant facts that would not otherwise have been disclosed." (Appendix A to Petition in Docket No. 512, pp. 15a-16a)

The Court of Appeals' November opinion also contradicted its prior July holding that a failure seasonably to seek the requisite Commission approval, whether or not the Fund's shareholders would be disadvantaged by the joint transaction, is a violation of §17(d) and Rule 17d-1. (Appendix A to Petition in Docket No. 512, pp. 15a-17a)

In the final analysis, the Court of Appeals disposed of the substantial questions raised before it by concluding that General Time "lacks standing" to raise them. (Appendix A, p. 11a)

The Court reasoned with respect to General Time's standing that (a) a portfolio company of a mutual fund is not protected against violations of the Act; thus, (b) it lacks standing to maintain its own suit to enjoin such violations; and, therefore, (c) it lacks standing to appeal an adverse judgment, binding on it as a party, that will enable the joint transaction to be consummated.

By its decision, the Court of Appeals also denied General Time standing to be heard at an evidentiary hear-

ing on the scope of appropriate relief, although it was a party-defendant and had participated in all prior phases of this case (administrative hearing before the Commission, proceedings in the District Court and appeals to the Court of Appeals).*

The Court of Appeals thus interposed an insurmountable barrier between the parties engaged in unlawful acts and the party against whom those acts were directed. In so depriving General Time of its right to be heard, the Court has contravened principles enunciated by this Court, and has denied General Time due process of law.

Reasons for Granting the Writ

I. The Decision of the Court of Appeals Raises Federal Questions of Great Importance to the Investing Public and to the Effective Implementation and Enforcement of the Securities Laws.

When it passed the Investment Company Act of 1940, Congress was concerned with abuses in the mutual fund industry and with matters of national public interest and

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* The Commission stated to the District Court that General Time's request for an evidentiary hearing should be granted since the evidence General Time proposed to introduce would be of relevance and importance in determining the scope of any final decree fashioned by the Court. (Transcript of Hearing, September 16-17, 1968, p. 15) Thus, the Court of Appeals' conclusion that "none of the parties" except General Time "desired to submit any evidence" is not entirely accurate. (Appendix A, p. 5a) However, even if true, it does not justify the refusal to hold such a hearing which deprived General Time of its right to be heard.

significance to the investing public.* Reflecting that concern, Congress committed to the Commission the jurisdiction and power to fashion comprehensive regulations to govern the acts and practices of mutual funds and their affiliates.

Pursuant to the §17(d) mandate to "prescribe rules and regulations", the Commission adopted Rule 17d-1 which prohibits participation by mutual funds and affiliated persons in joint transactions "unless an application . . . has been filed with the Commission and has been granted by an order . . ." approving the transaction.** This Court has recognized that

> "Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own. . . ." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 767 (1947).

The Commission advocated this approach in the Courts below:

> "Thus, the question of whether or not the takeover should be consummated will be determined, in the first instance, by the Commission in the exercise of its authority and responsibility under the Act,

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* See "Findings and Declaration of Policy" of the Act, 15 U. S. C. §80a-1, Appendix D, pp. 25a-28a.

** The proscriptions of §17(d) and Rule 17d-1, that mutual funds may not participate in joint transactions on a less advantageous or different basis than their affiliates, and that such participation be on a basis consistent with the policies and purposes of the Act, are to be applied initially by the Commission upon its review of timely applications required by that Section and Rule.

> subject to judicial review." (Memorandum of the Securities and Exchange Commission In Support of Its Proposed Final Judgment of Permanent Injunction, p. 6)

In its July opinion, the Court of Appeals recognized that the "only effective method of regulation [under §17(d)] was to require advance disclosure" to the Commission for its approval or disapproval of the proposed joint transaction. (Appendix A to Petition in Docket No. 512, p. 16a) The Court noted in that opinion that the Commission is the "agency responsible for the execution of Congressional policy and vested with expertise" regarding matters involving joint transactions under the Act, and quoted with approval principles set forth by this Court in *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 800 (1945):

> "'An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based on evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration'."* (Appendix A to Petition in Docket No. 512, p. 14a)

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* In view of these principles, the Court below should have preserved the *status quo*. As this Court said in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433 (1940):

(*Footnote continued on following page*)

But all these principles were discarded by the Court of Appeals in both its July and November opinions, when it judicially approved on its own the joint transaction of Industries and Fund to vote their unlawfully acquired stock, and when it speculated as to the results of the administrative proceeding requested by the Commission, and then concluded by way of prejudgment that such a proceeding would be disadvantageous to respondents.

Thus the decision of the Court of Appeals will stultify the Commission's disclosure, application and approval requirements under the Act, will not deter similar abuses in the future, and will "adversely affect" the "national public interest and the interest of investors".* See "Findings and Declaration of Policy" of the Act, 15 U.S.C. §80a-1 (Appendix D, p. 26a).

(*Footnote continued from preceding page*)

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."

See also, *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246 (1951); *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (2d Cir. 1948), petition for *cert. dismissed*, 366 U. S. 908 (1949); *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 191 F. 2d 658 (D. C. Cir. 1951), *cert. denied*, 343 U. S. 955 (1952).

* The importance of the questions raised in the instant case, including the Act's protection of portfolio companies against overreaching by mutual funds and their affiliates in contravention of the express purposes and policies of the Act, has again recently been underscored in a suit brought by a portfolio company claiming violations of §17 by a mutual fund and its affiliates. *National Sugar Refining Co.* v. *Burnham & Company, et al.*, 68 Civil 4590 (S. D. N. Y. 1968).

The "Findings and Declaration of Policy" specify that mutual funds "are affected with a national public interest" which is "adversely affected" whenever they engage in conduct contravening the prohibitions of the Act and the Rules enacted by the Commission pursuant to specific delegations thereunder.*

In summary, the Court below ignored the existence in this case of all the factors necessitating deference to an agency's jurisdiction.** First, Congress has expressly delegated to the Commission the role of approving joint transactions before they can be implemented. Section 17(d) of the Act. Second, in cases such as this, involving complex, technical questions concerning mutual fund-affiliate relations, the need is apparent for initial expert review by the agency having continuous and specialized knowledge and experience. See, *e.g.*, *Far East Conference* v. *United States*, 342 U. S. 570, 574-575 (1952). Third, uniformity and consistency of the regu-

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* Indeed, the statement by the Court of Appeals that §17(d) "does not aim to prevent an affiliate and an investment company from jointly acquiring control of another company . . ." (Appendix A, p. 13a) directly contravenes the Findings of the Act "that investment companies are affected with a national public interest in that, among other things . . . such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce . . ." (Appendix D, p. 25a)

** In its July opinion the Court below held that the substantial evidence doctrine, as applied in *SEC* v. *Central-Illinois Securities Corp.*, 338 U.S. 96, 113-27 (1949), required confirmation of the Commission's finding that Industries and Fund violated the Act. But in both its July and November decisions the Court contradicted that doctrine by making its own findings (in contravention of §43(a) of the Act), *e.g.*, that the violation was "innocent", and by refusing to give substantial weight to the Commission's request for aid in preserving and protecting its primary jurisdiction under the Act.

latory scheme under the Act can only be promoted by deference to the Commission. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 220-21 (1966). Finally, the integrity of the regulatory scheme and the efficient administration of justice require courts to permit the Commission to exercise its primary administrative functions.* See, *e.g.*, *Maddock & Miller, Inc.* v. *United States Lines*, 365 F. 2d 98, 101 (2d Cir. 1966).

II. The Decision of the Court of Appeals Is in Conflict With the Principles Established by this Court for Determining the Standing of a Party to be Heard.

In its November opinion, the Court below held that General Time did not have standing to sue, standing to appeal, or even standing to elicit proof, in connection with a violation of the Act involving a takeover of General Time. That holding was based on the Court's view that the party seeking to be heard, General Time, was not within the group covered by the terms of the statute, and its prejudgment as to the ultimate availability of the relief sought. General Time submits that the standard adopted below is in conflict with pronouncements of this Court which clearly establish the right to be heard on the part of aggrieved parties not specifically covered by a statute.

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* In *Fontaine* v. *SEC*, 259 F. Supp. 880, 887 (D. P. R. 1966), it was held that "the doctrine of primary jurisdiction" is applicable to administrative proceedings involving §17 of the Act. Moreover, courts have traditionally acceded to the primary jurisdiction of an agency when such jurisdiction has been asserted by a private party or the agency, or both. *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U. S. 658 (1963); *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548 (1959); *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134 (1946); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *Trans-Pacific Airlines* v. *Hawaiian Airlines*, 174 F. 2d 63 (9th Cir. 1949).

This Court has made it clear that standing is broader than "coverage", and that the "gist of the question of standing" is whether the party seeking to be heard has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends" for illumination of difficult questions. *Baker* v. *Carr,* 369 U. S. 186, 204 (1962).

This Court has rejected a relief-oriented coverage theory by making clear that standing is *not* dependent upon a predetermination of the likelihood that a party will ultimately be granted relief:

> "It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it." *Baker* v. *Carr, supra* at 208.

Very recently, in *Flast* v. *Cohen,* 392 U. S. 83 (1968), this Court further indicated the breadth of the prerequisites for standing:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." (*Id.* at 99)
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>
> "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." (*Id.* at 99-100)
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> * * *
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> "So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits . . . or those which are feigned or collusive in nature . . . ." (*Id.* at 100)

Flast v. *Cohen, supra,* also makes clear that standing exists when there is "a logical nexus between the status asserted and the claim sought to be adjudicated." (*Id.* at 102)

Finally, it is difficult to imagine a better case than this in which, as *Flast* points out, the Court may "feel confident that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor." (*Id.* at 106)

The Court below nevertheless held that General Time was not a party intended to be covered by the Act,* and then denied General Time standing by relying upon that construction of §17(d):

> ". . . Congress necessarily assumed that the court's jurisdiction would be invoked by someone showing an injury of the sort the Act meant to prevent, and GTC [General Time] has not done this." (Appendix A, p. 11a)

The Court nonetheless recognized General Time's "logical nexus" to the violation of the Act that was the subject matter of the controversy being "adjudicated", but still denied it standing to challenge that violation:

> "To allow a company whose shares were being acquired by an affiliate and an investment company without the prior approval required by §17(d) and Rule 17d-1 . . . to enforce the Investment Company

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* General Time's Petition now pending in Docket No. 512 challenges the Court of Appeals' construction of the Act which excluded portfolio companies of mutual funds and the general investing public from the coverage of the protective provisions of the Act.

> Act . . . would stretch [the standing doctrine] well beyond the bounds limned by [Congress]." (Appendix A, pp. 12a-13a)

In relying exclusively on "coverage", the Court below has adopted an approach directly in conflict with the principles of *Baker* v. *Carr* and *Flast* v. *Cohen, supra.** General Time's standing is clear since it has a "stake" in the outcome of the controversy, has sharpened "the presentation of issues . . . for illumination of difficult" questions (369 U.S. at 204), and has "a logical nexus" to the "claim sought to be adjudicated" (392 U.S. at 102).**

The standard adopted by the Court below will have a direct impact on the fundamental rights of aggrieved parties to be heard. Henceforth, at least in the Second Circuit, in order to have standing parties must be able to demonstrate specific coverage by the statutes in question. The instant case is illustrative of the consequences of the Court's standard. Here, General Time's standing was denied despite its multiple "status" (as a portfolio company of Fund, and a statutory affiliate of both Fund and Industries) with respect to the very "claim sought to

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* The Second Circuit has also created coordinate conflict with the Fifth Circuit which has correctly stated the test for standing:

> "Stated broadly, standing to litigate a 'case or controversy' depends on whether the plaintiff's interest, economic or civil, or the public's interest is sufficiently important to justify judicial determination of the controversy." *Puente de Reynosa S. A.* v. *City of McAllen*, 357 F. 2d 43, 46 (5th Cir. 1966).

** Indicative of General Time's personal stake in this controversy is its right to participate in §17 administrative proceedings. Its right has been recognized by the Commission (Memorandum of the Commission in Support of Its Proposed Final Judgment of Permanent Injunction, p. 6), and General Time ought to have standing to raise the issue of primary jurisdiction in order to protect that right.

be adjudicated" (the continuing violations of the Act involving an unlawful takeover of General Time by Fund and Industries).

The conflict with this Court's principles was further graphically demonstrated when the Court of Appeals reasoned that "coverage" is not only the test for standing to sue, but also for standing to appeal:

> "[General Time's] lack of standing to complain of a violation of §17(d) is as fatal on appeal as if it had brought an independent suit." (Appendix A, p. 14a)

Irrespective of General Time's standing to *sue*, it was joined as a defendant and is bound by the final judgment and clearly has standing to *appeal* as a party aggrieved by a lower court judgment.*

The approach of the Court below with respect to standing to appeal directly conflicts with *Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U. S. 77 (1958), where this Court held that a mere intervener has "standing to secure review of the judgment below by appeal", because

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* General Time brought its own suit to enjoin respondents' §17(d) violations. On October 23, 1968, the Court of Appeals affirmed the District Court's dismissal of that action. *General Time Corporation* v. *Talley Industries, Inc.*, — F. 2d — (2d Cir. 1968), unofficially reported in CCH Fed. Sec. L. Rep. ¶92,291, p. 97,393. (General Time has not petitioned this Court for certiorari in that case because substantially the same issues are raised by the instant Petition and the Petition in Docket No. 512.) In its opinion in that case, the Court of Appeals recognized that its July decision, upon which the District Court's final judgment was based, "*is binding on GTC* [General Time] *as a party; indeed, in that capacity, GTC is now seeking Supreme Court review* [in Docket No. 512]." *Ibid;* emphasis supplied.

> "It is enough, for purposes of standing, that we have an actual controversy before us in which [appellant] has a direct and substantial personal interest in the outcome." (*Id.* at 83)

A party's standing to appeal requires only the necessary "interest" in an "actual controversy", and does not depend upon a court's view as to the specific coverage of a statute or what should be the outcome of the controversy. See *Hanson* v. *Denckla,* 357 U. S. 235, 245 (1958); *Glenn* v. *American Surety Co.,* 160 F. 2d 977, 981 (6th Cir. 1947); *West* v. *Radio-Keith-Orpheum Corp.,* 70 F. 2d 621, 624 (2d Cir. 1934); *John T. Porter Co.* v. *Java Cocoanut Oil Co.,* 4 F. 2d 476, 478 (9th Cir.), *cert. denied* 268 U. S. 607 (1925).

Moreover, the consequences of the decision of the Court of Appeals will deprive party-defendants of crucial rights to participate in a meaningful way in proceedings that can result in final determinations adverse to them. In this case, the Court below affirmed the denial by the District Court of General Time's right to elicit evidence in the District Court. That denial conflicts with the Sixth Circuit which held in *Cohen* v. *Young,* 127 F. 2d 721, 724 (6th Cir. 1942), that "[s]ince appellant is a party" it follows that it "had a right to be heard not only in argument, but in the presentation of evidence." See also, *SEC* v. *Frank,* 388 F. 2d 486 (2d Cir. 1968).

The Court of Appeals' decision not only conflicts with the specific directives of this Court for determining standing, but also contravenes the philosophy underlying the securities laws as expressed by this Court.

The securities laws were enacted by Congress in part as prophylactic legislation to prevent abuses arising from transactions in the securities of publicly-held companies. Private enforcement is "a necessary supplement to commission action" and can be, as with proxy rules, *J. I.*

Case v. *Borak,* 377 U. S. 426 (1964), "a most effective weapon" in the enforcement of the Act consonant with its broad Declaration of Policy "that investment companies are affected with a national public interest." Appendix D, p. 25a. That "enforcement here" is sought "by a private party rather than the agency should not be controlling." *Studebaker Corp.* v. *Gittlin,* 360 F. 2d 692 698 (2d Cir. 1966). This Court's directive that "securities legislation" be construed "flexibly to effectuate its remedial purposes", *SEC* v. *Capital Gains Research Bureau,* 375 U. S. 180, 195 (1963) can be effectively implemented in an action brought by the issuer corporation, which is in the best position to take immediate preventive action to protect the integrity of transactions in the corporation's stock. Indeed, the issuer is probably the only party with up-to-date information, and with the financial resources, to act expeditiously and bring a suit to prevent, for the benefit of the corporation and its stockholders, the continuing unlawful transactions in its stock before substantial, and perhaps irreparable, damage occurs.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 197—September Term, 1968.

(Argued November 1, 1968 Decided November 19, 1968.)

Docket No. 32792

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

GENERAL TIME CORPORATION,

Defendant-Appellant,

and

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Defendants-Appellees.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeal by General Time Corporation from a final judgment of permanent injunction entered by the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, in an action by the SEC, in which GTC was a defendant, to enjoin an affiliate of an invest-

ment company and the investment company from violating §17(d) of the Investment Company Act by transactions involving General Time Stock. Affirmed.

PAUL G. PENNOYER, JR. (Chadbourne, Parke, Whiteside & Wolff, New York, N. Y., Lawrence Kill and Jerold Oshinsky, of Counsel), *for Appellant.*

WALTER L. STRATTON (Donovan Leisure Newton & Irvine, New York, N. Y., Ben Vinar and Roger W. Kapp, of Counsel), *for Appellee Talley Industries, Inc.*

CLENDON H. LEE (O'Connor & Farber, New York, N. Y., Stanley L. Sabel, of Counsel), *for Appellees American Investors Fund, Inc. and Chestnutt Corporation.*

RICHARD V. BANDLER, Associate Regional Administrator (Philip A. Loomis, Jr., General Counsel, David Ferber, Solicitor, Paul Gonson, Ass't General Counsel, Washington, D. C., Edwin H. Nordlinger, Securities and Exchange Commission, New York, N. Y., of Counsel), *for Securities and Exchange Commission, amicus curiae.*

FRIENDLY, *Circuit Judge*:

This is the third and, we hope, the last chapter of litigation in this court concerning the acquisition by Talley Industries, Inc. (Industries) and American Investors Fund, Inc. (Fund) of stock in General Time Corporation (GTC). The earlier ones, Docket Nos. 32506 and 32299/32300, are chronicled in 399 F. 2d 396 (2 Cir. 1968) and —— F. 2d ——, slip opinions 1968 Term 107-19, and we shall assume familiarity with these opinions.

Appendix A

The instant appeal stems from our first decision, 399 F. 2d 396, in which we upheld the SEC's position that by acquiring shares of GTC in the winter of 1967-68 and interesting Fund in also purchasing them, Industries had, perhaps unwittingly, violated §17(d) of the Investment Company Act[1] and the Commission's Rule 17d-1 thereunder.[2] In remanding the case to the District Court for the Southern District of New York for the entry of an appropriate decree, we were at pains to make clear, however, that "our reversal of the judgment dismissing the complaint does not imply any belief on our part that the SEC is entitled to the drastic relief sought," 399 F. 2d at 405. This had included a requirement that

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[1] This provides:

> (d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company (other than a company of the character described in section 80-12(d) (3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant.

[2] This prohibits transactions within the scope of §17(d)

> . . . unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted by an order entered prior to the submission of such plan or modification to security holders for approval, or prior to such adoption of modification if not so submitted, ...

Appendix A

Industries and Fund withdraw any votes previously cast at the annual meeting of GTC in April 1968, where a slate nominated by a committee formed by Industries had apparently won a contested election, and an injunction against their voting their shares for nominees for directors whose names had been or might be proposed by Industries or for any merger or consolidation of GTC with Industries. We pointed out, 399 F. 2d at 405:

> "The objective of §17(d) of the Investment Company Act is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies by causing the company to participate 'on a basis different from or less advantageous than that of such other participant.' On the face of things that has not happened here up to this time, and the objective for a court of equity must be to insure that it does not happen in the future. While we do not undertake to particularize the form of a decree, a prohibition against sale of its shares by Industries without according Fund a fair opportunity to participate would be one obvious device to that end. On the other hand, as at present advised, we fail to perceive how the interest of Fund's stockholders would be advanced by such provisions as requiring Industries and Fund to withdraw votes cast at the April 22 stockholders' meeting of General Time and enjoining further voting by them. Requirements of that sort would have a strong tendency to induce forced liquidation at least on the part of Industries, which surely did not make its large investment in order to be a voteless minority stockholder in General Time, and this might well be detrimental rather than advan-

> tageous to the stockholders of Fund. Whether or not General Time had sufficient standing to direct judicial attention to the violation of §17(d), an issue on which we have no occasion to pass, protection of the interests of its management in retention in office is not an objective of that section. While an order going beyond what would otherwise be the necessities of the case may sometimes be justified as against a deliberate flouter of regulatory statutes, Industries and Fund cannot be so regarded."

Judge Wyatt proceeded promptly to carry out the task assigned to him. He ascertained that none of the parties except GTC desired to submit any evidence. The SEC had joined GTC as a defendant, although seeking no relief against it other than a temporary restraining order against its reconvening the 1968 annual meeting or giving any effect to the votes cast there until a preliminary injunction was issued. In light of what he considered GTC's limited role in the action, the judge declined to receive evidence from GTC but allowed its counsel to make an extensive offer of proof. After inviting all parties to submit proposed final decrees and supporting briefs, he distributed a proposed decree drawing on these drafts and then held a further hearing where suggestions were received and many were adopted.

The decree entered by the district court begins by providing generally that so long as Industries is an "affiliated person" of Fund as that term is defined in §2 (a)(3) of the Investment Company Act, Industries and Fund are enjoined from effecting any transaction in which Industries acts as principal and Fund is a joint or a joint and several participant with Industries without first having obtained Commission approval. It then

says that certain acts are not be be regarded as "transactions" thus enjoined, provided there is no consultation or communication between Industries and Fund concerning them. These include the voting of any GTC shares owned by either; the nomination by Industries of directors for election to the board of GTC and solicitation by Industries of proxies for their election or with respect to any merger, consolidation or sale of assets; the disposition by Fund of any GTC shares owned by it; and the merger or consolidation of GTC and Industries or the sale of either's assets to the other. The last provision was importantly qualified by a statement that "nothing contained in this judgment affects whatever applications may be required under Section 17(b) of the Act."[3] The decree then proceeds with elaborate provisions designed to insure Fund equal or preferential treatment with respect to any sale of the GTC shares. Industries may not sell GTC shares on the New York Stock Exchange without giving Fund advance notice of three full business days; if Fund desires to sell, Industries must desist from selling for ten business days unless Fund shall sooner have completed its sales or abandoned its selling program. So long as Fund holds any GTC shares, Industries may not sell any of its own otherwise than on the NYSE save (1) as incident to a merger or similar transaction on terms

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[3] So long as Industries is an affiliate of Fund and of GTC, any transaction whereby Industries or GTC acquired the GTC shares owned by Fund would be prohibited by §17(a)(2) and, if the transaction involved issuance of the purchaser's securities, also by §17(a)(1), unless the SEC granted an exemption under §17(b); this can be done only if the Commission finds, *inter alia*, that "the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned."

equally available to all GTC shareholders; (2) pursuant to a tender offer from a third person equally available to all GTC shareholders, with Fund to have a preference over Industries if the offer is for a limited number of shares; (3) in any other way that enables Fund to dispose of an equal percentage of its stock "on exactly the same terms and conditions as the disposition by Industries"; or (4) in any other manner approved by the Commission and thereafter by the district court. GTC is directed to reconvene its annual meeting, which had been recessed since April 22, 1968, and to include the votes cast by Industries and Fund in the count. The decree concludes with the usual provision retaining jurisdiction.

The SEC has not appealed from the decree, which broadly sustained its position. GTC has. Its complaint is that the district court did not enter the decree the SEC had proposed. This provided that "unless and until an application pursuant to Section 17(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1 first has been filed with and has been granted by an order of" the Commission, Industries and Fund not only were enjoined from further acquisitions of stock of GTC but were required to withdraw any votes cast at the 1968 annual meeting, were enjoined from voting shares for nominees proposed by Talley or for merger or other combination of GTC with Talley, and were forbidden to transfer or dispose of any of their GTC shares.[4] In declining to enter the decree proposed by the SEC, the judge stated that while he "would feel obliged"

[4] Our summaries both of the court's judgment and of the SEC's proposed judgment are abbreviated and omit numerous provisions not central to the dispute.

to follow the lead given by this court's opinion "to the extent that I am permitted to make an independent finding and determination, I have made that finding and determination that no such injunctive relief is appropriate."[5] At our invitation the SEC has submitted a brief as *amicus curiae* explaining why it believes its proposed judgment should have been entered.

We stress at the outset that the issue is not whether we would upset or approve the upsetting of an order of the SEC containing the provisions of the decree proposed by it to the district court. Cases such as *SEC* v. *New England Electric System,* 390 U. S. 207 (1968), are thus inapposite. The only order the SEC has entered here is one denying the request for a declaration of nonapplicability of §17(d) to the purchases by Industries and Fund or, in the alternative, for retroactive approval. Instead of making its own order, §§38(a), 40, 42(a), the SEC, doubtless because of exigencies of time, availed itself of the authority conferred by §42(e) to come into the district court and invoke the court's injunctive powers. When it did this, it submitted itself to judicial concepts of equity. In our first opinion we referred briefly to *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329-30 (1944), decided under a statute whose language was very similar to that of §42(e) of the Investment Company Act. The entire passage from Mr. Justice Douglas' opinion merits quotation:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An

[5] The decree the SEC submitted to Judge Wyatt differed from the prayer of its complaint in being wholly conditioned by inclusion of the "unless and until" clause quoted in the text. Contrast 399 F. 2d at 401.

> appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' Meredith v. Winter Haven, 320 U. S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

It is said, however, that this case is different. The issue in *Hecht Co.* v. *Bowles* was whether past violations required an injunction against future ones that might or might not occur, and the case raised no problem of the relation between court and agency. Here, it is argued, the district court has refused to enjoin a violation that is right under its eyes, namely, the voting of the GTC stock acquired by Industries and Fund. Such voting, it is contended, does not cease to be a part of a "transaction" in which Fund is "a joint or a joint and several participant" with Industries simply because there is no further consultation or communication between them. The argument continues that if a proper application had been made under Rule 17d-1, the SEC might have approved the acquisition of the shares but have required a further application before allowing them to be voted—although it is hard to understand why any business man would buy stock under such a threat of administrative sterilization and equally hard to perceive how the Commission could find that voting by an affiliate and an investment company under demo-

cratic election rules would amount to participation by the investment company "on a basis different from or less advantageous than" the affiliate. Again, while the conditions developed by the district court with respect to sale—some of them suggested by the SEC—appear admirably designed to achieve the statutory objective, it is contended that the devising of such conditions was the job of the SEC and not of the district judge.

Mere statement makes it plain that the arguments are more concerned with the adjective question—by no means an unimportant one—of the proper relation of court and agency in the enforcement of the Investment Company Act than with the substantive objective of protecting the security holders of Fund, to which §17(d) is addressed. The practical point—and this, of course, is what the fighting is all about—is that, as we read the decree submitted by the SEC, Industries and Fund would have been obliged forthwith to withdraw the votes cast by them at GTC's 1968 annual meeting. This would have assured continuation of the incumbents' control until the spring of 1969, and if the Commission were to deny the application—perhaps, as intimated in its brief, on the ground of "the previous violation of the Act"—or if there were to be the delays not uncommon in the process of administrative decision and judicial review, for still another year, with the not unlikely prospect that Industries would tire of the game. We think it questionable whether such a result in this case of innocent violation of §17(d) would be consistent with "the qualities of mercy and practicality" that "have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs," of which the Supreme Court spoke. We are not required, however, to determine whether or not we would sustain these arguments, or some of them, if they were made on

an appeal by the SEC. The agency has not appealed,[6] and we conclude that GTC lacks standing to make them.

We fully recognize the principle, affirmed in *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432 (1964), that private enforcement "provides a necessary supplement to Commission action," to effect compliance with securities legislation. Indeed, we were the first court of appeals to uphold private actions to enforce duties created by the Investment Company Act. *Brown* v. *Bullock,* 294 F. 2d 415 (2 Cir. 1961); cf. *Schwartz* v. *Eaton,* 264 F. 2d 195, 198 (2 Cir. 1959). But this does not mean that any person may sue. When §44 of the Investment Company Act vested the district court with "jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder," Congress necessarily assumed that the court's jurisdiction would be invoked by someone showing an injury of the sort the Act meant to prevent, and GTC has not done this.

A case directly in point is *Greater Iowa Corp.* v. *McLendon,* 378 F. 2d 783, 792-94 (8 Cir. 1967), where the court

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[6] It states in its *amicus* brief that its decision not to appeal rested on its approval of much of the decree "as a substantive matter," on "its concurrence in this Court's construction of the phrase 'joint or a joint and several participant,' " and on "pressing priorities weighed against the Commission's limited manpower." At argument its counsel indicated that its chief concern in filing an *amicus* brief was to avoid the establishment of an unfortunate precedent. Our decision is limited to the special circumstances of this case—an excusable violation of §17(d) based on what we considered to be an overly literal although not unnatural reading of its words.

held that a corporation lacked standing to complain of acquisition of its stock by what was assumed to be an unregistered investment company. Like Judge Gibson there, "we see no basis under this [the Investment Company] Act that the issuer company can oversee the trading of its securities or object to the method in which it shares are acquired or the persons who acquire them." In *General Time Corp.* v. *American Investors Fund, Inc.*, 283 F. Supp. 400 (S. D. N. Y. 1968), Judge Bryan concluded that GTC lacked standing to complain of the transaction here at issue since Congress intended the protection of the Investment Company Act "to be for the benefit of persons having an interest in those companies" and not of corporations whose securities were being acquired. While on the appeal from that judgment we did not decide that question, —— F. 2d ——, ——, we believe the district court's view was sound—indeed, we now think our decision would better have been placed upon that ground, see fn. 7. Even if this court should ultimately uphold the standing of a corporation to seek an injunction against dealings in its securities violating provisions of the securities laws designed to protect its own security holders, a question we left open in Docket No. 32300, slip opinions p. 117, this would not mean that an issuer has standing to espouse the cause of stockholders of a stockholder endangered by the violation of a statute framed to meet their special needs.

To allow a company whose shares were being acquired by an affiliate and an investment company without the prior approval required by §17(d) and Rule 17d-1 to act as a "private attorney general" to enforce the Investment Company Act, see *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (2 Cir.), vacated as moot, 320 U. S. 707 (1943), would stretch that doctrine well beyond the bounds limned

by its author. Apart from the fact that there, as in *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940), and *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942), the courts were construing the phrase "person aggrieved" in statutes allowing review of administrative action, see 134 F. 2d at 701-12, Judge Frank proceeded on the basis that the petitioner, a buyer of coal whose price the Bituminous Coal Commission had fixed, was "threatened with financial loss by a Commission's order, which fixed prices and prevents competition among those from whom the consumer purchases," 134 F. 2d at 705, and thus was within the very class the statute aimed to protect. See Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613-17 (1968). The only argument made to show how GTC may suffer financial loss from the acquisition of its stock by Industries and Fund in an unapproved joint transaction forbidden by Rule 17d-1, was that GTC might obtain a higher price in a merger or other combination if the prospective partner were not already in control. Apart from the facts that GTC here declined to discuss a merger with Industries before the 1968 annual meeting and then negotiated one with another company on unattractive terms, see 399 F. 2d at 400-01, §17d does not aim to prevent an affiliate and an investment company from jointly acquiring control of another company *simpliciter;* it seeks only to prevent their doing this on a basis wherein the investment company fares worse than the affiliate. In short, even if we were to assume a possibility of loss to GTC from the transaction accomplished by Industries and Fund, this would not constitute the injury to holders of investment company securities that §17(d) sought to prevent. GTC has not been vested with the role of guardian either of the shareholders of Fund or of the integrity of the administrative process.

We do not believe matters should stand any differently because in this case GTC was named as defendant in the SEC's action. The only relief the SEC sought against it was a temporary restraining order against reconvening the annual meeting pending the issuance of an injunction, and this has now been denied. While the decree does direct GTC to proceed with the long-delayed meeting, that is only what the law would require in any event once the SEC's prayer for an injunction against this was denied. While the SEC could appeal from the denial of the relief sought against GTC, the latter cannot. When we look behind form to substance, GTC is endeavoring on this appeal to vault from its position as a nominal defendant to that of a plaintiff and to take over a role which the true plaintiff, the SEC, has abandoned. Its lack of standing to complain of a violation of §17(d) is as fatal on appeal as if it had brought an independent suit.[7]

Since GTC has indicated that in the event of an adverse decision it will endeavor to carry the matter further, we think it best to decide the question of continuing the injunction *pendente lite* against the reconvening of the 1968 annual meeting that, in one way or another, now has been in effect for more than half the term for which the directors were elected. Counsel for Industries suggested at the argument that if we were unwilling to dissolve the injunction at that time, we should lift it to the extent of allowing the inspectors of election to report and any other normal business to be completed, with the proviso that if the persons declared to be elected as directors were

[7] To the extent that our opinion in Docket No. 32300, —— F. 2d at ——, slip opinions, 1968 Term, 116-17,may imply that GTC has standing to seek review of the scope of relief granted the SEC, we withdraw this.

other than the incumbents, the new directors would be enjoined from assuming office until our decision on this appeal. This, it was said, would have the advantage of enabling the parties to determine promptly whether they wished to indulge in a further round of litigation concerning the validity of proxies under state law rather than deferring such a decision until the Supreme Court acts on GTC's petitions for certiorari to review our decisions in Nos. 32506 and 32999[8] and the petition GTC announced its intention to file from our decision here if this should be against it. While we deferred acting on Industries' request pending decision, we think it proper that the injunction against reconvening the annual meeting be partially lifted, on the terms proposed by Industries, on a date ten days after the filing of this opinion. If within twenty days after the filing of this opinion GTC files a petition for certiorari to review this judgment, the injunction against the assuming of office by any directors other than the incumbents shall continue until final determination by the Supreme Court in all these cases where GTC has sought certiorari; if it should not, the injunction will be fully lifted. In view of this disposition, GTC's application for a stay pending final determination by the Supreme Court on the petition for certiorari in Docket No. 32299 is denied. The parties may submit proposed orders if they desire.

Judgment affirmed.

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[8] GTC informed us that it did not intend to seek certiorari from our affirmance of Judge Bryan's decision in No. 32300.

APPENDIX B

United States District Court for the Southern District of New York

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION, DEFENDANTS.

Filed October 4, 1968

FINAL JUDGMENT OF PERMANENT INJUNCTION

This matter having come on for trial before this Court without a jury, [recitation of appearances of counsel for parties], and this Court having issued a final judgment and order dismissing the complaint as to all defendants; and the Court of Appeals for the Second Circuit having on July 31, 1968 issued its opinion reversing the said judgment and directing this Court to proceed promptly to formulate an injunction consistent with its opinion, and the mandate of the said Court of Appeals having been transmitted to this Court on September 13, 1968; and this Court having been advised by the Commission, by Industries, and by Fund and Chestnutt Corporation that they did not wish to present any further evidence on the subject of the relief to be granted by injunction and this Court having been advised by General

Time that it wished to present further evidence on that subject but this Court declining to receive such evidence from General Time as a nominal party defendant; and proposed forms of final judgment (with supporting memoranda) having been submitted by the Commission, by Industries, and by Fund and Chestnutt Corporation, respectively, and General Time having submitted a statement (with supporting memorandum) requesting entry of final judgment in the form proposed by the Commission; and after hearing counsel for the parties on this date,

Now, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I.

A. So long as, or whenever, defendant Industries is an "affiliated person" of defendant Fund as that term is defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. §80a-2(a)(3); the "Act"), defendants Industries and Fund are permanently enjoined from hereafter effecting any transaction in which Industries acts as principal and in which the Fund is a joint or a joint and several participant with Industries without first having obtained from the Commission approval under Section 17(d) of the Act and under Rule 17d-1 promulgated thereunder (17 CFR 270.17d-1).

B. None of the following acts is a "transaction" enjoined by paragraph A provided there is no consultation between Industries and Fund concerning the act and no communciation between them concerning the act (other than that required by law or by this judgment):

1. The voting on any matter by Industries or Fund at any meeting of shareholders of General

Appendix B

Time of any shares of common stock of General Time ("General Time shares") now owned by either of them.

2. The nomination by or on behalf of Industries of directors for election to the Board of Directors of General Time and the solicitation by Industries, alone or in conjunction with others (not including, however, Fund) of proxies for the election of such nominees or the solicitation of proxies in respect of any merger, consolidation or sale of assets involving General Time.

3. The disposition by Fund at any time, or from time to time, of General Time shares now owned by it.

4. A merger or consolidation of General Time and Industries or any subsidiary of Industries or a sale of the assets of General Time to Industries or any subsidiary of Industries, or a sale of the assets of Industries to General Time or any subsidiary of General Time.

Nothing contained in this judgment affects whatever applications may be required under Section 17(b) of the Act.

II.

So long as Industries is an "affiliated person" of Fund as that term is defined in Section 2(a)(3) of the Act, defendant Industries is permanently enjoined from entering into or inducing Fund, through its investment adviser or otherwise, to enter into any transaction in which Fund is a joint or a joint and several participant with Industries.

Appendix B

III.

So long as Fund continues to own any of the shares of capital stock of General Time now owned by it, defendant Industries is permanently enjoined from selling any shares of capital stock of General Time now owned by it on the New York Stock Exchange (the "Exchange") except in accordance with the following procedure: if Industries proposes to make sales of General Time stock on the Exchange, it shall notify Fund by telephone or by telegraph of the number of shares proposed to be sold; within three full business days after the giving of such notice, Fund shall notify Industries that it (Fund) does or does not propose to sell on the Exchange shares of General Time stock owned by it (Fund) within the following ten business days; if Fund notifies Industries that it (Fund) does not propose to sell any shares of General Time stock on the Exchange in that period, then Industries may sell on the Exchange its General Time shares to that number of shares stated in the notice given; if Fund notifies Industries that it (Fund) proposes to sell General Time shares on the Exchange within the following ten business days, then Industries may not sell its General Time shares on the Exchange for a period of ten business days after receipt of the notice from Fund, unless in the meantime, Fund has completed its proposed sales, as to which it shall notify Industries, or Fund shall have notified Industries that Fund had abandoned its proposal to sell General Time shares within the period. Industries shall not in any event sell on the Exchange more than 10,000 General Time shares in any five business day period nor more than 25,000 such shares in any calendar month.

Appendix B

IV.

So long as Fund continues to own any of the shares of capital stock of General Time now owned by it, defendant Industries is permanently enjoined from hereafter disposing of General Time shares now owned by it (Industries) except by sales on the Exchange as provided in III above and except as follows:

A. in exchange for securities of another corporation (or cash, or a combination of cash and securities) in connection with the merger, consolidation, sale of assets or liquidation of General Time, so long as such disposition by Industries is on terms and conditions available to Fund and to all other shareholders of General Time pro rata;

B. pursuant to a tender offer from any person (not an affiliated person, or an affiliated person of an affiliated person, of Industries or of the Fund), *provided* that such offer is made to Fund and to all other shareholders of General Time, and *provided further* that if any such offer is limited to a specified number of General Time shares and if the Fund shall advise Industries in writing, not later than 10 days prior to the expiration date of such offer (or not later than the expiration of one half the period of such offer if the term thereof is less than 10 days), that it desires to accept such tender offer, Industries shall take appropriate steps to give the Fund the opportunity to dispose of all of the General Time shares which Fund desires to dispose of in response to such offer, before Industries shall dispose of any of its General Time shares in response to such offer;

Appendix B

C. with respect to a proposed disposition by Industries of General Times shares in any other manner than one described above, Industries shall give written notice to Fund of such proposed disposition. Such notice shall include: (a) a description of each proposed transaction with the name of each proposed purchaser from Industries, the number of shares proposed to be disposed of, the consideration to be received by Industries, the method of payment and the proposed closing date; and (b) a statement that arrangements have been made for Fund to be offered an opportunity to dispose of such number of General Time shares owned by it as is equal to the percentage of Industries' then holdings of such stock proposed to be so disposed of by Industries, such arrangements to provide for such disposition by Fund on exactly the same terms and conditions as the disposition by Industries. At the expiration of five business days after any such notice is given to Fund, Industries may proceed to dispose of the number of General Time shares set forth in the notice by it to Fund, and in the manner set forth in such notice, provided that, if within such five day period Fund elects to accept the opportunity to dispose of General Time shares on the terms specified in such notice and has so advised Industries, its (Fund's) General Time shares have been disposed of as provided in such notice; and

D. in any other manner approved by the Commission and thereafter approved by this Court.

V.

Defendant Fund is enjoined promptly to notify Industries and the Commission (a) when, as and if Fund ceases to be a holder of five percent (5%) or more of

Industries' outstanding voting securities and (b) when, as and if Fund ceases to be a holder of all General Time shares now owned by it.

VI.

Defendant General Time is enjoined to reconvene the Annual Meeting of Shareholders of General Time, recessed from time to time since April 22, 1968, at 2 P.M. on Thursday, October 10, 1968, and to include the votes heretofore cast by Industries and Fund at the Annual Meeting of Shareholders of General Time held on April 22, 1968 in the count of votes cast at the meeting, and to require the inspectors of the election of directors of General Time to report on the results of the voting at the aforementioned Annual Meeting and to complete the business at said Annual Meeting in accordance with the By-laws of General Time and in accordance with its normal practice.

VII.

This action is dismissed as to defendant Chestnutt Corporation.

VIII.

Jurisdiction is retained by this Court for the purpose of enabling any party to apply at any time to this Court for such further order and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any provisions hereof, for the enforcement of compliance herewith or for the punishment of violations hereof.

Dated: New York, New York
October 4, 1968

INZER B. WYATT,
United States District Judge.

Judgment entered: 10-4-68

/s/ JOHN J. OLEAR, JR.
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Defendants-Appellees,

GENERAL TIME CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

It is further ordered, adjudged and decreed that, if, within twenty days, the appellant files a petition for a writ of certiorari to the Supreme Court of the United States, the injunction against the assuming of office by any directors other than the incumbents shall continue until final determination by the Supreme Court in all cases where the appellant has sought certiorari.

It is further ordered, adjudged and decreed that if petitions for writs of certiorari are not so filed, the injunction will be fully lifted.

A. Daniel Fusaro,
Clerk.

APPENDIX D

INVESTMENT COMPANY ACT OF 1940

(15 U.S.C. §80a-1 *et seq.*)

SEC. 1 FINDINGS AND DECLARATION OF POLICY

(a) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is found that investment companies are affected with a national public interest in that, among other things—

(1) the securities issued by such companies, which constitute a substantial part of all securities publicly offered, are distributed, purchased, paid for, exchanged, transferred, redeemed, and repurchased by use of the mails and means and instrumentalities of interstate commerce, and in the case of the numerous companies which issue redeemable securities this process of distribution and redemption is continuous;

(2) the principal activities of such companies—investing, reinvesting, and trading in securities—are conducted by use of the mails and means and instrumentalities of interstate commerce, including the facilities of national securities exchanges, and constitute a substantial part of all transactions effected in the securities markets of the Nation;

(3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce;

(4) such companies are media for the investment in the national economy of a substantial part of the national savings and may have a vital effect upon the flow of such savings into the capital markets; and

(5) the activities of such companies, extending over many States, their use of the instrumentalities of interstate commerce and the wide geographic distribution of their security holders, make difficult, if not impossible, effective State regulation of such companies in the interest of investors.

(b) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is declared that the national public interest and the interest of investors are adversely affected—

(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management;

(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other invest-

ment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders;

(3) when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities;

(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;

(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny;

(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;

(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities; or

(8) when investment companies operate without adequate assets or reserves.

It is declared that the policy and purposes of this subchapter, in accordance with which the provisions of this

subchapter shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors. Aug. 22, 1940, c. 686, Title I, §1, 54 Stat. 789.

SEC. 2(a)(3) DEFINITIONS

(3) "Affiliated person" of another person means (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof.

SEC. 17(d) TRANSACTIONS

(d) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company (other than a company of the character described in section 80a—12(d) (3) (A) and (B) of this title), or any affiliated person of such a person or principal underwriter, acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of such rules and regulations

as the Commission may prescribe for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant. Nothing contained in this subsection shall be deemed to preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

SEC. 38. RULES, REGULATIONS, AND ORDERS; GENERAL POWERS OF COMMISSION

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the powers conferred upon the Commission elsewhere in this subchapter, including rules and regulations defining accounting, technical, and trade terms used in this subchapter, and prescribing the form or forms in which information required in registration statements, applications, and reports to the Commission shall be set forth. For the purposes of its rules or regulations the Commission may classify persons, securities, and other matters within its jurisdiction and prescribe different requirements for different classes of persons, securities, or matters.

SEC. 42. ENFORCEMENT OF SUBCHAPTER

(e) Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the proper

United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 80a—7 of this title, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter. Aug. 22, 1940, c. 686, Title I, § 42, 54 Stat. 842.

SEC. 43. COURT REVIEW OF ORDERS

(a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order

of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Su-

preme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

RULE 17D—1. APPLICATIONS REGARDING JOINT ENTERPRISES OR ARRANGEMENTS AND CERTAIN PROFIT-SHARING PLANS.

(*a*) No affiliated person of or principal underwriter for any registered investment company (other than a company of the character described in Section 12(d) (3) (A) and (B) of the Act) and no affiiated person of such a person or principal underwriter, acting as principal, shall participate in, or effect any transaction in connection with, any joint enterprise or other joint arrangement or profit-sharing plan in which any such registered company, or a company controlled by such registered company, is a participant, and which is entered into, adopted or modified subsequent to the effective date of this rule, unless an application regarding such joint enterprise, arrangement or profit-sharing plan has been filed with the Commission and has been granted by an order entered prior to the submission of such plan or modification to security holders for approval or prior to such adoption or modification if not so submitted, except that the provisions of this rule shall not preclude any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor.

(*b*) In passing upon such applications, the Commission will consider whether the participation of such registered or controlled company in such joint enterprise, joint arrangement or profit-sharing plan on the basis proposed is consistent with the provisions, policies and purposes

of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

(*c*) "Joint enterprise or other joint arrangement or profit-sharing plan" as used in this rule shall mean any written or oral plan, contract, authorization or arrangement, or any practice or understanding concerning an enterprise or undertaking whereby a registered investment company or a controlled company thereof and any affiliated person of or a principal underwriter for such registered investment company, or any affiliated person of such a person or principal underwriter, have a joint or a joint or several participation, or share in the profits of such enterprise or undertaking, but shall not include an investment advisory contract subject to Section 15 of the Act.

(*d*) Notwithstanding the requirements of paragraph (*a*) above, no application need be filed pursuant to this rule with respect to any of the following:

(1) Any profit-sharing plan provided by any controlled company which is not an investment company for its officers or employees, provided no affiliated person of any investment company which is an affiliated person of such controlled company participates therein.

(2) Any plan provided by any registered investment company or any controlled company for its officers or employees if such plan has been qualified under Section 401 of the Internal Revenue Code of 1954 and all contributions paid under said plan by the employer qualify as deductible under Section 404 of said Code.

(3) Any loan or advance of credit to, or acquisition of securities or other property of, a small business concern, or any agreement to do any of the foregoing, ("Investments") made by a bank and a small business investment company (SBIC) licensed under the Small Business Investment Act of 1958, whether such transactions are contemporaneous or separated in time, where the bank is an affiliated person of either (*i*) the SBIC; or (*ii*) an affiliated person of the SBIC; but reports containing pertinent details as to investments and transactions relating thereto shall be made at such time, on such forms and by such persons as the Commission may from time to time prescribe.[1]

[1] Applicable only to small businesss investment companies licensed under the Small Business Investment Act of 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

BRIEF OF RESPONDENT TALLEY INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF OF RESPONDENT TALLEY INDUSTRIES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introductory Statement

The instant petition for certiorari is the last of a series of efforts by the lame-duck management of General Time Corporation ("General Time") to maintain itself in office despite the fact that it was voted out of office on April 22, 1968 at the annual meeting of its stockholders. This it now seeks to accomplish in an action which it did not bring, in which no lawfully protected rights or interests of General Time are involved, and in which the Securities and Exchange Commission (the "Commission") which brought this action has rested content with the decision of the Dis-

trict Court, sought no appeal therefrom and has not petitioned this Court for review on certiorari.

The petition fails to make clear that the sole aspect of the judgment below which petitioner seeks reviewed is the nature of the equitable relief that was awarded in favor of the Commission against petitioner's co-defendants, Talley Industries, Inc. ("Industries") and American Investors Fund, Inc. (the "Fund"). Indeed, it is simply not possible to understand the nature of this litigation from the petition.

The suit below was one brought by the Commission as plaintiff against respondents Industries, the Fund and Chestnutt Corporation. In its complaint, the Commission charged these defendants with violation of § 17(d) of the Investment Company Act of 1940 (hereinafter the "Act") and sought broad injunctive relief. Petitioner was only a nominal defendant below. No relief was sought by or against it in the action. Its presence in the case at all was simply to provide a means to permit the court to preserve the status quo pending determination of whether the Commission's request for disfranchisement of Fund's and Industries' General Time stock should be granted.

As the Court of Appeals stated below, petitioner is "endeavoring on this appeal to vault from its position as a nominal defendant to that of a plaintiff and to take over a role which the true plaintiff, the SEC, has abandoned." (Pet. App. A, 14a)*

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* Refers to pages in the Appendix to the petition herein. References to pages in the body of the petition are indicated by "Pet. ——." References to the Appendix in petitioner's previous petition in this case (Docket No. 512) are indicated by "Pet. App. —— in Docket No. 512."

The facts have been carefully detailed by the Court of Appeals below in its first (July 31, 1968) opinion in this case (reported at 399 F.2d 396). A description of the salient facts, however, including those leading to the second opinion (November 19, 1968) of the Court of Appeals below (—— F.2d ——; unofficially reported at CCH Fed. Sec. L. Rep. ¶ 92,303, p. 97,437, and reproduced in Pet. App. A, 1a-15a) is presented *infra* in our Counter Statement of the case.

The Pertinent Statutes

Sections 1(a) and 1(b) of the Act

The Investment Company Act of 1940 (54 Stat. 815, 15 U.S.C. § 80a-1 *et seq.*) is introduced by sections 1(a) and 1(b), which are quoted in Pet. App. D, 25a-28a. Although the petition treats these two sections as though they were one and the same, the two are quite different. Section 1(a) lists those factors which describe Congress' understanding of why "investment companies [were] affected with a national public interest." Section 1(b), on the other hand, enumerates those vices which Congress deemed adversely affected the national public interest and the interest of investors and which were meant to be corrected by the Act.

Thus, while § 1(a) refers to the fact that investment companies "customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce," this condition was not declared adverse and the Act was not designed to regulate it. The Commission has recently reported to Congress:

> "[N]either the Commission nor the Congress of 1940 saw any need to preclude investment companies from acquiring dominant positions—if their managers chose to do so—in the enterprises in which they invest. Accordingly, the Act in general imposes no restrictions on the capacity of investment companies to control the enterprises in which they invest." *Public Policy Implications of Investment Company Growth,* H.R. Rept. No. 2337, 89th Cong., 2d Sess. (1966), p. 307.

Among the conditions, however, which were deemed adverse and were listed as such in § 1(b) of the Act was "(2) when investment companies are organized, operated, managed or their portfolio securities are selected, in the interest of directors, officers, investment advisors, depositors or other affiliated persons thereof . . . rather than in the interest of all classes of such companies' [i.e., the investment companies'] security holders."

Section 17(d)

As one step toward correcting the abuses referred to in § 1(b)(2) above, Congress passed § 17 of the Act. Thus, § 17(a) (with which we are not here concerned) prohibits sales, purchases or loans between an investment company and an affiliate, and subsection (b) provides that the Commission shall grant exemptions from such prohibition on the basis of criteria appearing in that section.

Section 17(d), with which we are concerned in the case at bar, prohibits transactions participated in jointly by an investment company and its affiliate in contravention of such rules and regulations as the Commission might prescribe "for the purposes of limiting or preventing participation by such registered investment company . . . on a basis different from or less advantageous than that of such

other participant." That section, in pertinent part, reads as follows:

> "It shall be unlawful for any affiliated person of . . . a registered investment company . . . acting as principal to effect any transaction in which such registered company . . . is a joint or a joint and several participant with such person . . . in contravention of such rules and regulations as the Commission may prescribe *for the purpose of limiting or preventing participation by such registered . . . company on a basis different from or less advantageous than that of such other participant* . . . ." (Emphasis added.)

The SEC recently gave its administrative interpretation to § 17(d) in a release which it issued in October 1967:

> "Section 17(d) and Rule 17d-1, taken together, are designed to regulate certain situations where persons making the investment decisions for the registered or controlled company may have a conflict of interest and the danger exists that the investment company or its controlled company may be overreached by such affiliated persons. . . ." Investment Company Act of 1940 Release No. 5128 (Oct. 13, 1967), p. 2.

The July 31st opinion below pointed out:

> "The objective of § 17(d) of the Investment Company Act is to prevent affiliated persons from injuring the interests of stockholders of registered investment companies by causing the company to participate 'on a basis different from or less advantageous than that of such other participant.'" Pet. App. A, 4a.

Counter Statement of the Issue Presented

The issue presented is whether or not General Time has standing to appeal from a final decree entered by the District Court and affirmed by the Court of Appeals below in an action brought by the Securities and Exchange Commission against the Fund and Industries for alleged violation by the Fund and Industries of § 17(d) of the Investment Company Act (15 U.S.C. § 80a-17(d)) and SEC Rule 17d-1 thereunder (17 C.F.R. § 270.17d-1), said statute and rule being designed to protect the Fund from participation in a joint transaction with an affiliate, Industries, "on a basis different from or less advantageous than" that of its affiliate, when

(1) General Time, as a portfolio company, that is, a company in which the Fund and Industries have each made an investment, is outside the scope and protective coverage of the provisions of §17(d) of the Investment Company Act of 1940 that were put in issue in the action below brought by the Securities and Exchange Commission and there was no finding below of any injury to any legal interest of General Time on the facts of record;

(2) General Time was only a nominal defendant in said action;

(3) no relief was sought against General Time in said action and no relief is directed against it in said final decree;

(4) plaintiff Securities and Exchange Commission and defendants Fund and Industries have not sought review of the final decree entered by the District Court and affirmed by the Court of Appeals (in fact, plaintiff Securities and Exchange Commission did not even appeal to the Court of Appeals); and

(5) General Time's sole objective is to seek to have included in the remedial portion of the final decree provisions for relief which are inconsistent with the purpose of §17(d) (*i.e.*, protection of the Fund and its shareholders) and which were so found to be by the Court below, petitioner's aim being to prevent Industries and Fund from voting the shares of General Time held by each to oust the management of General Time from office.

Counter Statement of the Case

1. The Facts

Fund is a registered investment company. Industries is an "affiliated person" of the Fund within the meaning of § 2(a)(3)(B) of the Act by virtue of Fund's ownership of over 5% (*i.e.*, about 9%) of Industries' outstanding voting stock, which Fund had purchased in the open market.

On December 29, 1967, Franz G. Talley ("Talley"), President of Industries, telephoned the Fund's offices to speak to Kenneth Haupt, an analyst employed by the Fund whom Talley had met at the time Fund purchased its stock in Industries. By reason of the nature of the call, Haupt referred Talley to George Chestnutt ("Chestnutt"), President of the Fund. Talley's telephone call was prompted by the fact that he believed the Fund had confidence in Talley and in the management of Industries, as evidenced by Fund's having accumulated a large amount of Industries' outstanding stock. Talley told Chestnutt that Industries had purchased stock in General Time, that it intended to buy more and that it had in mind the possibility of a future merger with General Time. Talley asked whether Fund might also wish to buy some General Time stock.

After consulting with his counsel, Chestnutt reported back to Talley that the Fund would examine the situation, but that if the Fund did buy stock in General Time it would maintain its independence and would make no agreement with Industries as to voting, disposition of the stock or whatever. Several days later, after further consideration of the matter, Chestnutt determined that Fund should take a position in General Time. He was motivated both by his study of the company's earnings and of its chart performance and by a belief that if Industries sought a merger the stock would rise as a result of that offer or of others it might stimulate. Fund subsequently did buy 210,000 shares at an average price of $28.49 per share. Industries' 257,937 shares, most of which were acquired after Fund had completed its purchases, were acquired at an average cost to Industries of $36.76 per share.

On February 19, 1968, Talley met with members of the management of General Time and expressed Industries' desire to negotiate a merger with General Time. General Time's management considered the matter but decided to fight any such proposal and so informed Talley. On February 25, 1968, General Time sued Industries and Fund in the Southern District of New York charging, *inter alia*, that they had violated § 17(d) of the Act. Management sought injunctive relief which would disfranchise Fund and Talley.*

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* The District Court dismissed General Time's complaint on April 17, 1968 on the basis of General Time's lack of standing to assert such a cause of action. 283 F. Supp. 400. On appeal, that decision was affirmed. —— F.2d —— (2d Cir., October 23, 1968, Docket No. 32300), unofficially reported in CCH Fed. Sec. L.

On February 29 Industries demanded a copy of General Time's list of stockholders, which was not, however, forthcoming until litigation, brought and won by Industries in Delaware, eventually forced the list from General Time several weeks later.*

During March, Industries organized and sponsored an Independent Stockholders Committee of General Time Corporation (the "Committee"). The Committee made preparations to solicit proxies for the election of its nominees for director of General Time in opposition to the management's slate at the annual meeting of stockholders scheduled to be held on April 22, 1968.

On March 25, following an investigation by the Commission (pursuant to its statutory authority under § 42(a) of the Act) into General Time's charges that Industries and the Fund had violated § 17(d) of the Act, the Commission notified Industries that the Committee's proxy solicitation material would not be cleared unless Industries filed an application with the Commission under Rule 17d-1 for approval of what the staff considered a joint transaction falling within § 17(d) of the Act. Under that compulsion, Industries did file such an application, seeking a declaration of non-applicability of § 17(d) or, in the alternative, retroactive approval, and Fund joined in the application. Reference to the application was made in the

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Rep. ¶ 92,291, p. 97,389. General Time has announced that it does not intend to seek certiorari with respect to that § 17(d) case, which it brought as plaintiff (see Pet. 20 n.).

* After time-consuming attempts to conduct oral examination on issues which the Chancery Court (and subsequently the Supreme Court) of Delaware ruled were irrelevant, General Time defaulted. An order was entered against it and management was forced to deliver a stockholder list to Industries.

Committee's proxy statement and the statement was thereupon cleared by the Commission. Fund in no way participated in the proxy contest, either before or after the Committee's proxy statement was cleared.

Neither Fund nor Industries had known or believed that their actions could be construed as a "joint transaction" requiring prior SEC approval. As they viewed the situation, there had been no promises, agreements or arrangements of any kind, as Chestnutt emphasized there would not be when he told Talley at the outset that the Fund would reserve full independence as to how it might vote its General Time stock and as to when and whether it might dispose of it.

The Commission set Industries' application down for hearings to commence on April 16, 1968. In the interim, the management of General Time negotiated a prospective "bail-out merger" * with a juke box and vending machine company from Illinois (The Seeburg Corporation). Chestnutt found the terms of that proposal "so shockingly unattractive that I couldn't believe that the newspaper report [of April 15, 1968] could be accurate." On Thursday, April 18th, the Fund announced that it intended to vote its stock against the management and in favor of the Committee's slate and the Fund so informed the Commission on the record in the administrative proceedings.

The hearings, which had begun on April 16th, ended on April 18th. The following day the Commission heard oral argument and thereupon filed its Memorandum Opin-

* The plan to merge General Time and Seeburg was announced as being contingent upon the continuation of General Time's then present management.

ion and Order Denying Application* reciting the pertinent facts and concluding that "Under these circumstances we think it clear that Industries and AIF [the Fund] entered into and carried out a joint arrangement within the meaning of Section 17(d) and Rule 17d-1 to acquire GTC [General Time] stock by concerted action." The Commission's Memorandum Opinion and Order Denying Application made no reference to Fund's intention of voting its holdings for the candidates supported by Industries but noted its "continuing jurisdiction under Section 17(d) and Rule 17d-1 over any future transfers by Industries of the GTC stock it has acquired in violation of these provisions."

On April 5, 1968, General Time had filed the second of its lawsuits against Industries, the Fund and others, this one charging that the Committee's proxy solicitation was false and misleading. General Time again sought an order disfranchising Industries and the Fund. General Time applied twice for preliminary injunctive relief but was twice denied such relief on the facts. The second application was made on the morning of April 22nd, the day of the stockholders' meeting, but when that application was denied** the stockholders' meeting proceeded.

At the stockholders' meeting the ballots were cast (including those of Industries and of the Fund for the Com-

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* Reproduced in Pet. App. D, 46a-50a, in Docket No. 512, Oct. Term 1968.

** On appeal by General Time, these two rulings of the District Court were affirmed, —— F.2d —— (2d Cir. Docket 32299, October 23, 1968), unofficially reported at CCH Fed. Sec. L. Rep. ¶ 92,291, p. 97,389. General Time's petition for certiorari to review that affirmance bears October Term 1968 Docket No. 716 in this Court.

mittee's slate), and the meeting was adjourned to May 3rd to permit the inspectors of election to count the votes and prepare their report. By reason of the litigation which ensued, however, the stockholders' meeting was repeatedly recessed, at first by stipulation and subsequently by court order, until it was permitted to be completed on December 2, 1968. On that date, the inspectors of election reported that the Committee's candidates had received 979,235 votes against 882,159 votes for the incumbent directors, a margin in favor of the Committee's candidates of 97,076 votes. By reason of the Court of Appeals' order of November 19, 1968 (see Pet. App. C, 23a-24a), the newly elected directors of General Time (*i.e.*, the Committee's candidates) are stayed from taking office pending final determinations by this Court in Docket Nos. 512, 716 and 821.

2. *The Proceedings Below*

On May 1, 1968, while the stockholders' meeting was in recess to permit the count of ballots, the Commission brought the instant litigation seeking an order which would, *inter alia*, require Industries and Fund to withdraw the votes each had cast on April 22nd in favor of the Committee's slate, and which would permanently enjoin Industries and the Fund from voting their shares in the future for any directors whose names had been or might be proposed by Industries or for any merger or consolidation of General Time and Industries.*

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* The petitioner's characterization to the contrary notwithstanding, the Commission did not bring suit "to protect its primary jurisdiction under the Act" (see Pet. 3) by "compel[ling] respondents to seek Commission approval" of their voting, past or future (see Pet. 5). The complaint sought a permanent injunction against any such voting. See Pet. App. A, 9a-10a, in Docket No. 512.

After an expedited trial, the District Court dismissed the Commission's complaint on the basis that § 17(d) had not been violated. 286 F.Supp. 50 (S.D.N.Y. 1968), reproduced as Pet. App. B, 19a-38a, in Docket No. 512. The Commission appealed and the Court of Appeals reversed (399 F.2d 396), holding that whatever might be the Court's own views as to whether the facts showed a "joint transaction," the Commission's findings, having been supported by "substantial evidence," were binding. As to relief, however, the Court of Appeals noted that the Commission had not purported to make any order concerning remedy. The Court ruled that the case was a suit in equity and not an action to enforce an administrative order, and that it was therefore the responsibility of the courts to "'do equity and mould [the] decree to the necessities of the particular case.' *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944)." (Pet. App. A, 17a, in Docket No. 512) Finding that the violation had not been deliberate, that disfranchisement was basically punitive and that (as it then appeared to the court) an order such as was sought by the Commission would hurt the Fund and its shareholders rather than effect the Congressional purpose of protecting them, the Court of Appeals remanded to the District Court with instructions to that Court to formulate an appropriate decree.*

On remand, contrary to Petitioner's assertions that the District Court refused to permit an evidentiary hearing

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* Apparently anticipating that the Commission would be unable to marshal further evidence or argument in the District Court that disfranchisement was appropriate to the statutory purpose, General Time petitioned this Court for review of the July 31, 1968 decision of the Court of Appeals (see Docket No. 512) and sought, unsuccessfully, in that Court and before Mr. Justice Harlan, to stay proceedings in the District Court pending such review.

(Pet. 7), the District Court invited the Commission to introduce whatever evidence bearing on relief it chose to offer. The Commission, however, did not choose to offer any further evidence at all. The court announced that it did not intend to hear any evidence from the nominal defendant, General Time, whose interests were different from (in fact, obviously antagonistic to) those of the Fund's shareholders. However, General Time asked for, and was granted, time until the following day to prepare and submit an offer of proof. The offer, when made, was not so much an offer of proof as an offer to conduct cross-examination of adverse witnesses to ascertain whether there might in fact be any evidence from which argument might be made.*

The Commission persisted in the District Court in its earlier argument that the final decree ought to contain provisions forcing Industries and Fund to withdraw the votes each had cast at the 1968 meeting of stockholders of General Time. (Such an order would have meant, of course, a victory by default for management.) The Commission again urged that the wrongdoers should be deprived of the "fruits of their wrong" so as to "deter similar future violations" by others. The Commission argued that if such relief damaged those whom the Act was meant to protect, *i.e.*, the stockholders of the Fund, they might seek redress against the individuals responsible.

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* Petitioner asserts that in this endeavor its position was supported by the Commission (Pet. 7). This statement is not really true. Counsel for the Commission did suggest that the court receive evidence from General Time, regardless of General Time's status, "if General Time does have evidence that is relevant and material to the shape of the decree and that might be helpful to your Honor in that connection. . . ." The court persisted, however, in its ruling that while it would take any evidence that the

Having in mind the July 31st decision of the Court of Appeals, and on his own consideration of the matter, District Judge Wyatt ruled that "to the extent that I am permitted to make an independent finding and determination, I have made that finding and determination that no such injunctive relief is appropriate." (See Pet. App. A, 8a.) Judge Wyatt thereupon declined to include in the decree any provision that the April 22nd votes of Industries and the Fund be withdrawn.

In its July 31st opinion the Court of Appeals noted the nature of one aspect of equitable relief it believed might be appropriate, *i.e.*, "a prohibition against sale of its shares by Industries without according Fund a fair opportunity to participate." (Pet. App. A, 17a, in Docket No. 512) The final decree formulated by the District Court did impose extensive restrictions on any disposition by Industries of its General Time stock, giving the Fund equal or preferential treatment with respect to any sale.

The management of General Time was, of course, disappointed that it was unable to pluck victory in the election out of the ashes of the Commission's litigation despite the fact that the stockholders of the Company had voted them out of office. Management, therefore, caused an appeal from the final decree to be filed in the name of General Time Corporation with the Court of Appeals.

The Securities and Exchange Commission did not appeal.*

Commission wanted to present, it would not accept evidence from General Time. The Commission chose to offer no evidence.

* The Court of Appeals invited the Commission to submit a brief as *amicus curiae* and the Commission did so. The Commission's brief, however, expressed no opinion on the central question of

On November 19, 1968, the Court of Appeals affirmed the final judgment entered by the District Court. In its opinion (Pet. App. A) the Court of Appeals noted that this was not an action for the enforcement of a Commission order providing for specific relief. It was a suit in equity, subject to judicial concepts of equity. The court found that the defendants' violation of § 17(d) had not been willful and held that punitive relief was not warranted. The Court of Appeals ruled that the relief decreed by the District Court accomplished the purpose of § 17(d) of protecting the Fund and its shareholders. In any event, the court held, General Time—a purely nominal party defendant—had no standing to assert a claim under § 17(d) or to appeal in the case at bar from the relief awarded in favor of plaintiff, the Commission, against defendants Fund and Industries.

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whether or not General Time had standing to appeal. In its brief, the Commission admitted that it took "no particular exception" to the substantive provisions of the final decree.

ARGUMENT

I.

Petitioner Has No Standing to Appeal Where the Judgment Sought to Be Appealed Was Not Adverse to It.

The instant action was brought, not by General Time, but by the Securities and Exchange Commission in performance of its role of overseeing enforcement of the Investment Company Act under § 42(e) thereof, 15 U.S.C. § 41(e). The Commission elected not to appeal from the final judgment of the District Court, and has not sought review here of the judgment of the Court of Appeals.

General Time was before the courts below as a nominal party defendant. No judgment was entered against it.* Nonetheless, General Time now purports to seek review, claiming that the courts below did not go far enough with respect to the relief granted against its co-defendants.

The law is clear that not every party to a judgment is entitled to appeal from it, but "only one injured by the judgment sought to be reviewed can appeal . . . ." *Parr* v. *United States,* 351 U.S. 513, 516 (1956). *Accord, Fuqua* v. *Bidwell,* 281 F.2d 753, 754 (6th Cir. 1960). Since the judgment below was not in any way adverse to General Time, petitioner has no standing to seek review of it. *Ibid.*

> "It is settled law that even a party cannot appeal from a decision which is not adverse to him. [Citations

* The District Court did direct that the stockholders' meeting reconvene and that the further business thereof (which had been stayed during the litigation) be completed. General Time has not objected to those provisions of the final decree. On December 2, 1968, the meeting was reconvened and its business was completed.

> omitted.] The decree of the district court was not directed at the intervening defendants. Where an injunction is granted, one cannot generally appeal from the order unless he is directly or indirectly restrained from the performance of some act." *Milgram* v. *Loew's, Inc.*, 192 F.2d 579, 586 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).

See also *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 325-26 (1945). General Time, having been in no way prejudiced by the injunctive decree entered against its co-defendants, simply had no standing to appeal from that final decree and has no standing to seek review in this Court.

II.

Petitioner Lacks Standing and the Determination Below to That Effect Does Not Conflict With Any Principles Enunciated by This or Any Other Court.

The general rule is well established by decisions of this Court and Federal courts of appeals that in order to have standing to maintain an action a party must be a member of the class intended to be protected by the statute and must have suffered the kind of injury against which the statute was designed to protect. *Stark* v. *Wickard*, 321 U.S. 288, 304 (1944); *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, 634 (1944); *L. Singer & Sons* v. *Union Pac. R.R.*, 311 U.S. 295, 301, 304 (1940); *Sprunt & Son* v. *United States*, 281 U.S. 249, 255 (1930); *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148-49 (1923); *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 790, 793-94 (8th Cir. 1967); *Pennsylvania R.R.* v. *Dillon*, 335 F.2d 292, 294-95 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964). *Chi-*

cago v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), is not to the contrary, see *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 6-7 (1968). His injury, moreover, "must be immediate and pecuniary and not a remote consequence of the judgment," *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 Fed. 494, 499 (9th Cir.), *cert. denied*, 239 U.S. 641 (1915). *Accord, In re Michigan-Ohio Bldg. Corp.*, 117 F.2d 191, 193 (7th Cir. 1941); *Mayer* v. *National Missile & Electronics, Inc.*, 326 F.2d 401, 402 (9th Cir. 1964). See *Webb* v. *Beverly Hills Fed. Sav. & Loan Ass'n*, 364 F.2d 146, 149 (9th Cir. 1966). And "a merely nominal party to an action cannot appeal." *Hamilton Trust Co.* v. *Cornucopia Mines Co., supra. Accord, Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 383 (1933).

Petitioner cites this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Flast* v. *Cohen*, 392 U.S. 83 (1968), as well as the Fifth Circuit's decision in *Puente de Reynosa, S.A.* v. *City of McAllen*, 357 F.2d 43 (5th Cir. 1966), for the proposition that traditional principles of standing are no longer to be applied by courts and that all that is now required is evidence of a sufficiently strong interest on the part of the plaintiff in the outcome of the case so that the courts may rest assured that the issues will be well framed by the litigants. Those cases involved the problem of defining principles of standing to assert the public interest against alleged violations by a governmental body of a Constitutional or statutory prohibition. There is a clear-cut distinction between the problems of standing raised by such "public actions" and the concern for standing in the case of private claims, see, *e.g.*, Jaffe, Judicial Control of Administrative Action 475 *et seq.*, 501 *et seq.* (1965); and as this Court noted in *Flast* v. *Cohen, supra*, 392 U.S. at

101-02, there are "various rules of standing applied by federal courts [which] have not been developed in the abstract" but rather "have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated."

In most "public actions," as in *Flast* v. *Cohen,* there is no one person or class of persons which can be singled out as the proper person or class of persons entitled to sue. The problem in these actions is not so much one of standing as it is one of other aspects of justiciability—*i.e.,* either a suit can be maintained by any citizen to vindicate the public right or it can be asserted by none. See generally *Flast* v. *Cohen,* 392 U.S. at 98-101 and n.17. As this Court went on to point out in *Flast,* even in a public action, where there is a particular class of persons most clearly affected, then "the federal standing doctrine would require that standing be limited to . . . the affected class." 392 U.S. at 105 n.25.

In the instant case, unlike the situation in *Flast* v. *Cohen* and similar cases, we are concerned only with standing to assert private rights, and the test is whether the party, here a nominal party, is within the class that the statute was designed to protect and suffered the kind of injury that the statute was designed to protect against. The authorities that support this statement are cited above.

The Investment Company Act has been held to create private rights of action which are enforceable at the suit of a person intended to be protected by the Act. *Brown* v. *Bullock,* 194 F.Supp. 207, 228 (S.D.N.Y.), *aff'd,* 294 F.2d 415 (2d Cir. 1961); *Taussig* v. *Wellington Fund, Inc.,* 313

F.2d 472, 476 (3d Cir.), *cert. denied,* 374 U.S. 806 (1963); and the general principles of standing have, of course, been held applicable in suits brought thereunder. In *Taussig, supra,* the court inferred a private right of action on the part of the stockholder of an investment company against the management company under § 35 of the Investment Company Act, and noted that "a breach of statutory duty which causes injury to one of the class that the statute serves to protect affords by implication a sufficient basis for a private civil suit by the injured party." Conversely, where plaintiffs are not persons within the class intended to be protected, they do not have standing to assert a claim under the Act. *Greater Iowa Corp.* v. *McLendon,* 378 F.2d 783, 790, 793-94 (8th Cir. 1967).

In *Greater Iowa,* plaintiffs were the issuer corporation and its directors and the defendants were an insurgent group of stockholders who had formed a voting trust. Plaintiffs alleged that defendants' trust was in reality an unregistered investment company in violation of the Investment Company Act, and plaintiffs sued to enjoin the defendants from proceeding, through the instrumentality of that trust, with steps designed to permit defendants to secure control. The court held that plaintiffs lacked standing to bring such an action "because they are not within the class that the statute was designed to protect." 378 F.2d at 793. The court ruled that:

> "Plaintiffs are merely fellow shareholders and the issuer of securities held by this alleged investment company. We see no basis under this Act that the issuer company can oversee the trading of its securities or object to the method in which its shares are acquired or the persons who acquire them." *Id.* at 794.

Similarly, in the case at bar, General Time, as merely the "issuer company," has no standing to oversee joint transactions alleged to violate an Investment Company Act provision intended to guarantee equal treatment to one of its stockholders (*i.e.*, the Fund) in a joint transaction participated in by another of its stockholders (*i.e.*, Industries). General Time simply is not a member of the class—the Fund or the Fund's shareholders—which § 17(d) was designed to protect.

Petitioner's attempts below to espouse the cause of the Fund and the Fund's shareholders (see its offer of proof below) was a sham. Petitioner cannot be heard to assert the rights of a class to which not only does it not belong, but to whose interests it is plainly antagonistic. See *Hansberry* v. *Lee*, 311 U.S. 32, 44 (1940); *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).

III.

The Relief Which Petitioner Demands Against Its Co-Defendants Would Contravene the Basic Purpose of the Investment Company Act.

Congress was explicit as to the purpose of § 17(d) in the language of the statute itself. Thus, joint transactions are proscribed if they contravene rules and regulations to be prescribed by the Commission "for the purpose of limiting or preventing participation by [a registered investment company] on a basis different from or less advantageous than that of" its affiliate. The statute was designed to protect investment companies and their stockholders from being taken advantage of by affiliates. Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., 1940, p. 1116; H.R. Rept. No. 2639, 76th Cong., 3d Sess., 1940, p. 9. *Investment Trusts and Investment Companies,* Rept. of the SEC, Part Three, "Abuses and Deficiencies in the Organization and Operation of Investment Trusts and Investment Companies" 22 (1939). And see Section 1(b)(2) of the Act, 15 U.S.C. § 80a-1(b)(2). In a recent release the Commission gave its administrative interpretation:

> "Section 17(d) and Rule 17d-1, taken together are designed to regulate certain situations where persons making the investment decisions for the registered and controlled company may have a conflict of interest and *the danger* exists that the *investment company or its controlled company* may be overreached by such affiliated persons. . . ." Investment Company Act of 1940 Release No. 5128 (Oct. 13, 1967), p. 2. (Emphasis added.)

But the relief petitioner seeks is wholly inconsistent with the interests of the Fund and its shareholders. Petitioner would ask this Court to ignore the language of § 17(d) and misapply the statute against the explicit purpose for which it was enacted, all for the benefit of petitioner's management. But "to construe statutes so as to avoid results glaringly absurd, has long been a judicial function." *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

In *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941), this Court refused to interpret the Securities Act of 1933 to bar the corporate issuer of unregistered stock from recovering the proceeds of the issue from the underwriter. Forfeiture of the issuing company's capital to a third party (the underwriter) would only have injured the very persons (the purchasers who had become stockholders of the issuer) whom the violated statutory provision was designed to protect.

> "Although the challenged contract bears no evidence of criminality and is fair upon its face, we are asked to apply a sanction beyond that specified by declaring it null and void because of relationship to a public offering. The basis for this demand is a supposed federal public policy which requires such annulment in order to secure observance, effectuate the legislative purpose and prevent noxious consequences. 312 U.S. at 42-43.
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> . . . . .
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> ". . . . [T]o accept the conclusion . . . would probably seriously hinder rather than aid the real purpose of the statute. *Id.* at 43.
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> . . . . .
>
> ". . . . And it would be anomalous to rest such an injury to the investors upon the fact that the transaction

in which the securities were distributed violated the Act, which was designed to protect those investors." *Id.* at 44 n.

General Time's petition for certiorari passes over the fact that the subject of this dispute is a final judgment which determined the appropriate equitable relief to be awarded on the fact findings below in an action for equitable relief brought by the Commission under § 42(e) of the Act, 15 U. S. C. § 80a-41(e). It was not error for the court below not to grant all of the injunctive relief sought by the Commission. No order of the Commission decreed such relief.* (See Pet. App. A, 8a.) By invoking equity, the Commission submitted itself to judicial concepts of equity. The court below found that the violation was the result of innocent mistake, that Fund and its shareholders had not been injured in any way, and that the defendants' conduct did not therefore justify drastic punitive relief. This Court has consistently held that purely punitive relief, such as that rejected below, is outside the province of equity and ought not be allowed in a court of equity. See, *e.g.*, *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409 (1945); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).** Furthermore, disfranchisement,

* Thus, as the court below noted, such cases as *SEC* v. *New England Elec. System*, 390 U.S. 207 (1968), are inapposite.

** Indeed, the SEC has gone on record previously to reject as improper the form of relief which it sought in this case. See *Pacific Ins. Co.* v. *Blot*, 267 F.Supp. 956, 958 (S.D.N.Y. 1967), where "the Court notes its concurrence with the Commission's view that permitting the [issuer] corporation to disable a purchaser from exercising his rights as a shareholder under state law—even if his purchase violated Rule 10b-5—'seems unnecessarily drastic and potentially unsettling for the securities markets and corporate af-

the court found, would be inconsistent with the purpose of protecting the Fund and its shareholders. These determinations were entirely within the discretion of the court. *Hecht Co.* v. *Bowles,* 321 U.S. 321, 326-29 (1944).

No case has ever held or suggested that a court of equity must grant injunctive relief—particularly the kind of drastic relief sought here—where in the opinion of the court it would be unjust and improper. On the contrary, the general rule, as stated by this Court in *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944), and quoted by the court below (Pet. App. A, 8a-9a), is that "The essence of equity jursdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." 321 U.S. at 329.

The foregoing principles are beyond dispute, and certainly there is no need for certiorari in the instant case.

CONCLUSION

The delay that has already resulted from this litigation has doubtless harmed all of the real parties in interest herein. At this writing, two-thirds of the term to which the Committee's candidates for director of General Time Corporation have been elected has expired. Whatever other purpose Section 17(d) of the Investment Company Act of 1940 may have been designed to serve, it was not designed to perpetuate in office a management which has been rejected by those who own the stock of the corporation.

---

fairs.' (Memorandum of the Commission, p. 9)." *Accord, Allied Artists Pictures Corp.* v. *D. Kaltman & Co.,* 283 F.Supp. 763, 765 (S.D.N.Y. 1967).

For that reason, and the reasons stated above, we pray that the instant petition for certiorari be promptly denied.

Respectfully submitted,

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IN THE

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS AMERICAN INVESTORS FUND, INC. AND CHESTNUTT CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF RESPONDENTS AMERICAN INVESTORS FUND, INC. AND CHESTNUTT CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents American Investors Fund, Inc. and Chestnutt Corporation submit this brief in opposition to the petition of General Time Corporation for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered November 19, 1968 which affirmed the final judgment of the District Court entered October 4, 1968.

Reasons for Denying the Writ

1. *The petition is sham and seeks to mislead the Court.*

The underlying assumptions of the petition are that a wrong has been committed; that the wrong has been pleaded; and that for reasons of both law and justice, petitioner is entitled to redress.

None of these assumptions is true. Each is demonstrably false.

There is no allegation of actual or potential injury to any person or party. The SEC and the courts below have found that there could be no injury to anyone.

Petitioner seeks to conceal the falsity of these assumptions by a calculated omission of the important and controlling words of the statute when introducing its "Questions Presented" (Pet., p. 2) and by failing to make any reference in the body of its petition (save in a single footnote on page 6), or in any appendix, to the SEC's complaint, or anywhere at all to petitioner's single paragraph answer which merely admits the seventeen allegations of the complaint.

That truncated excerpt from the statute omits the only important words, employing punctuation also calculated to mislead. The omitted words show that the grant to the Commission of rule making power was solely:

> "* * * for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant." Investment Company Act of 1940 §17(d), 15 U.S.C. §80a—17(d).

Mere reference to these words demonstrates that under these words in the statute and in the circumstances of this case the complaint and petitioner's answer did not, nor could they truthfully, put any matter of fact or law in issue.

Consequently, petitioner simply ignores all pleadings in the hope that this Court will be beguiled not to advert to the pleadings and the words of the statute. The complaint and petitioner's single paragraph answer admitting the seventeen allegations of the complaint are set forth as "Appendix A" and "Appendix B" to our brief in opposition to the petition in Docket No. 512.

We will not burden the Court by repeating the arguments contained in our brief in opposition in Docket No. 512, especially at pp. 9-12. We believe it is demonstrated that no case or controversy exists in the constitutional sense.

2. *No party in interest appealed or seeks review.*

The brief of the SEC submitted as *amicus curiae* at the request of the Court below stated with respect to the provisions of the final judgment of October 4, 1968 entered by the District Court (pp. 13-14):

> "* * * indeed as a substantive matter, we take no particular exception to them, and this is one reason why the Commission did not itself determine to appeal in this case".

The Court below said that the provisions of the judgment "appear admirably designed to achieve the statutory objective". (Pet., App. A., p. 10a) The Court of Appeals thereby approved the Chancellor's independent exercise of discretion.

All the real parties in interest were thus satisfied with the result of the final judgment, although these respondents adhere to our view that the initial dismissal of the complaint by Judge Wyatt was completely correct. (Now reported at 286 F. Supp. 50 and printed as Appendix B to the petition in Docket No. 512).

3. *No question of administrative law is involved.*

As pointed out at pp. 8 and 19 of our brief in opposition to petition in Docket No. 512, and as repeatedly emphasized in Judge Friendly's three opinions, the Commission never purported to order anything against any of the respondents. The Commission in a final footnote simply asserted continuing jurisdiction under Section 17(d) of the Act over any future transfer by Talley Industries, Inc. Since this case was an independent suit in equity, and not a suit to enforce any order of the Commission (there being none), the staff of the Commission eventually and properly abandoned any attempt to assert that the mere filing of a complaint created bootstraps whereby the staff of the SEC could lift themselves to an automatic judgment. Nevertheless, petitioner, as a nominal party, now urges that it may vicariously lift itself by the SEC staff's discarded bootstraps.

4. *Petitioner has no standing.*

As recently as *Flast* v. *Cohen,* 392 U.S. 83, this Court has reviewed the question of standing. The opinion cited *Heald* v. *District of Columbia,* 259 U.S. 114, 123, in footnote 20 (392 U.S. at p. 99) emphasizing that there must be a claim of injury by a party. One may not assert the rights of absent third parties. There was no possibility of injury to petitioner in *Heald,* just as there is no possibility of injury to petitioner in this case.

Thus, while independent focusing on "standing" may be logically prior, or prior in time, to focusing on other aspects of "justiciability", it is clear that petitioner has no "personal stake" in the outcome which could impart "the necessary concrete adverseness". *Flast* v. *Cohen, supra; Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227; *Baker* v. *Carr,* 369 U.S. 186, 204. The petition here is of "a hypothetical or abstract character". *Aetna Life Ins. Co.* v. *Haworth, supra,* 300 U.S. at 240-241.

In short, the petition seeks an advisory opinion on a hypothetical and abstract question where there is no possibility of injury to any person or party. Petitioner has no interest whatever. The public interest has been protected by provisions "admirably designed to achieve the statutory objective".

We submit that reference to the pleadings and the opinion below show no possibility that petitioner has standing or that any case or controversy exists over which this Court has jurisdiction.

CONCLUSION

For the foregoing reasons and for the reasons stated in our brief in opposition to the petition in Docket No. 512 the petition should be denied.

December, 1968

Respectfully submitted,

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PREME COURT, U. S.

JAN 7 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

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—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

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Respondents.

REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

I.

Respondent Talley Industries, Inc. ("Industries") asserts that the Securities and Exchange Commission ("Commission") did *not* bring suit in the instant case to protect its exclusive primary jurisdiction under the Investment Company Act of 1940 (the "Act"). (Industries' brief, pp. 12, 14, 16 and 25). Industries is incorrect, as is demonstrated by the Commission's complaint in the District Court (Exhibit A hereto), the Commission's pro-

posed "Final Judgment of Permanent Injunction" (Exhibit B hereto), and the Commission's Memorandum "In Support of its Proposed Final Judgment of Permanent Injunction" (Exhibit C hereto).

In its complaint (Exhibit A) the Commission requested relief designed solely to protect its exclusive primary power to review and approve or disapprove joint transactions. Paragraph (1) of the prayer for relief sets forth the full parameters of the Commission's request—there the Commission sought

> "a temporary restraining order, preliminary injunction and permanent injunction . . . restraining and enjoining Industries, Fund and Chestnutt . . . [from taking any action with respect to General Time stock] without *first* having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having *first* been granted by order of said Commission." (Exhibit A, p. 5a) (emphasis supplied).

The Commission's proposed final injunction (Exhibit B), filed with the District Court after remand of the case from the July decision of the Court below, and its supporting memorandum (Exhibit C), were fully consistent with the Commission's complaint, and reaffirmed the Commission's position that "it is for the Commission, rather than for this Court, to determine whether such transaction, or any aspect of it, should be approved." (Exhibit C, p. 17a).

The Commission's assertion of exclusive power over the joint transaction between Industries and Fund was consistent with the language and purpose of the comprehensive legislative scheme fashioned by Congress to regulate mutual fund-affiliate activities. The Court below ignored that legislative mandate, refused to accede to the Com-

mission's exclusive primary jurisdiction, and then compounded that error by itself judicially reviewing and approving the joint transaction between Industries and Fund.

II.

Industries incorrectly asserts that General Time had no standing to appeal from the final judgment (and thus could not assert the Commission's primary jurisdiction) "[s]ince the judgment below was not in any way adverse to General Time . . . ." (Industries' brief, p. 17).

That judgment, however, imposed substantial restraints injurious to the interests of General Time, which alone are sufficient to support its right as a party to appeal. These include:

1. The restraint on General Time's right (as an affiliate whose stock was the subject matter of the joint transaction) to participate in the administrative proceeding that the Commission demanded be held to allow it to exercise its primary jurisdiction.

2. The subjection of General Time to the restrictions and obligations of the Act, although the parties with whom General Time is affiliated (Industries and Fund) have been exempted by the final judgment from the Act and licensed to take over General Time by means violative of §17(d).*

3. The prohibition in paragraph IV(B) of the final judgment, which prevents Industries from selling its Gen-

---

* Indeed, the continuing ownership of General Time stock by Industries and Fund, sanctioned by the final judgment below, is the very basis of the affiliation which subjects General Time for an indefinite period, to the provisions and obligations of the Act and its numerous sections, e.g., §§ 17(a), 17(b) and 17(d). Clearly, review of that ownership was of direct interest and importance to General Time.

eral Time stock "pursuant to a tender offer from . . . an affiliated person [General Time], of Industries or of the Fund . . . ." (Appendix B to petition, p. 20a). Thus, *except for* the final judgment and the affiliations unlawfully created by the activities of Industries and Fund, General Time's powers to purchase its own shares from Industries would not have been impaired.

4. The subjection of General Time to the continuing jurisdiction of the District Court until Industries and Fund choose to meet conditions enumerated in the final judgment.

Indeed, the Commission aptly noted that, as a result of the final judgment,

> ". . . the wrongdoers [Industries and Fund] are left in a better position than they would have been had they complied with the law." (Brief of Securities and Exchange Commission to the Second Circuit, dated October 1968).*

The standing doctrine has never been applied in the hypertechnical manner urged by Industries. General Time's

---

* That incongruous result was foreshadowed by the Commismission as early as May 1, 1968, when it filed its complaint:

> "In order to prevent defendants from occupying a more advantageous position, with respect to carrying out the underlying goal of the stock purchases, which the Commission has found to have been illegal than they would have occupied had they not violated the Investment Company Act, it is necessary and appropriate for this court to take steps to prevent giving effect to the votes cast by defendants in support of or in consummation of their illegal acts . . ." (Commission's "Memorandum of Points and Authorities In Support of Application for Temporary Restraining Order and Preliminary Injunction." Docket No. 68 Civil 1762).

personal involvement in this case as a party below* and as the target of the violative joint transaction assures the practical adverseness and concrete presentation of issues required by this Court. The ultimate outcome of the controversy is of direct and of substantial importance to General Time and to its stockholders who have no equity interest in Industries. In these circumstances, General Time has the right to assert the primary jurisdiction of the Commission because it is entitled to participate before the Commission in administrative proceedings under the Act. As noted by the Commission:

> "General Time will be entitled to participate before the Commission in accordance with the Commission's Rules of Practice and to elicit any relevant evidence . . . ." (Exhibit C, p. 18a).

Industries' assertions that General Time lacks standing because, allegedly, it is not covered by the Act, underscores the importance of whether or not "portfolio companies of investment companies and the general investing public" are covered "under the protective provisions of

---

* General Time participated in the administrative evidentiary hearing before the Commission on April 16, 17 and 18, 1968, was named as a party-defendant in the Commission's complaint, fully participated in the district court trial proceedings, and participated in the Commission's appeal of the dismissal of its complaint by the district court. In these proceedings, General Time, for example, submitted evidence, cross-examined witness, filed briefs and made oral arguments.

the Act," the first question raised in General Time's petition in Docket No. 512, p. 3.*

The basic fallacy and inadequacy of Industries' approach to standing is apparent from its attempt to negate the principles espoused in *Baker* v. *Carr*, 369 U. S. 186 (1962), *Flast* v. *Cohen*, 392 U. S. 83 (1968) and *Puente de Reynosa S. A.* v. *City of McAllen*, 357 F. 2d 43 (5th Cir. 1966). Industries would limit those cases to controversies involving the public interest and claims this suit involves a mere private controversy. (Industries' brief, p. 19). But those cases are not so limited and, in any event, Industries overlooks that the instant controversy arose under a federal statute, the Act, and that General Time has multiple status under the Act (i.e., as a statutory affiliate, a portfolio company and a member of the investing public.) This is not a personal injury or contract case where the outcome is peculiarly personal to the parties involved. This suit is under the securities laws which, like the antitrust laws, were enacted for the benefit and protection of the public. Private actions to redress violations of federal statutes

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* General Time is constrained to note that Industries quotes twice in its brief (pp. 5 and 23) from Investment Company Act Release No. 5128 (Oct. 13, 1967) in support of its contention that the Act is designed solely to protect "investment companies and their stockholders from being taken advantage of by affiliates" (p. 23). Industries, however, disregarded the Act's breadth of coverage as recognized by the Commission in the very same paragraph of that Release:

> "The Commission believes that it is necessary and appropriate *for the protection of investors and in the public interest to require applications to be filed with the Commission* so that it may consider situations where a significant conflict of interest occurs with *respect to ownership of portfolio investments by the investment company and its affiliated persons.*" (p. 2) (emphasis supplied).

are encouraged, see, e.g., *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751-52 (1947); *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692, 697-98 (2d Cir. 1966); *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171 (S. D. N. Y. 1955).

The petition of General Time for a writ of certiorari should be granted.

Respectfully submitted,

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Exhibit A

Complaint

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION,

Defendants.

1. It appears to the plaintiff, Securities and Exchange Commission ("Commission"), that defendants American Investors Fund, Inc. ("the Fund"), Chestnutt Corporation ("Chestnutt") and Talley Industries, Inc. ("Industries") have been and are now engaged in acts and practices which constitute violations of Section 17(d) of the Investment Company Act of 1940 ("the Act"), 15 U.S.C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1. The Commission, pursuant to Section 42(e) of the Act, 15 U.S.C. 80a-41(e), brings this action to enjoin such acts and practices and for other relief.

2. This Court has jurisdiction under Section 44 of the Act, 15 U.S.C. 80a-43.

3. Each of the defendants is an inhabitant of, transacts business in, or may be found in the Southern District of New York. The acts and transactions complained of took place in substantial part within said district.

4. Defendant Fund is a diversified open-end investment company registered under the Act.

5. Defendant Chestnutt is defendant Fund's investment adviser.

6. Defendant Industries is a corporation of which more than 5% of the outstanding voting shares are owned by the defendant Fund and have been at all times mentioned herein.

7. By reason of defendant Fund's ownership of more than 5% of the outstanding common stock of defendant Industries, Industries is an "affiliated person" of the Fund within the meaning of Section 2(a)(3) of the Act, 15 U.S.C. 80a-2(a)(3).

8. Defendant General Time Corporation ("General Time") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Connecticut. Defendant Industries owns 257,937 shares of the common stock of General Time. defendant Fund owns 210,000 shares of the common stock of General Time.

9. On or about December 29, 1967, Franz G. Talley, president of defendant Industries, advised George A. Chestnutt, Jr., president of defendant Fund and of defendant Chestnutt, that Industries was buying the stock of defendant General Time with a view to Industries' effecting a merger with General Time and induced the Fund to enter

into a program with Industries to purchase the common stock of General Time through a common broker, M. Kimelman & Co. ("Kimelman"), so that Industries would be in a position to effect a merger with General Time.

10. Pursuant to this program, defendant Industries acquired 257,937 shares of common stock of defendant General Time between December 26, 1967, and February 23, 1968, of which all except 66,437 shares were acquired through Kimelman; and defendant Fund acquired between January 5, 1968, and February 15, 1968, through Kimelman, 210,000 shares of common stock of General Time.

11. By reason of the acts alleged in paragraphs 9 and 10, since on or about December 29, 1967, and continuing to the date hereof, defendant Industries and defendant Fund have been engaged in a joint transaction looking toward a merger of Industries and General Time.

12. By reason of the acts alleged in paragraphs 9 and 10, since on or about December 29, 1967, and continuing to the date hereof, defendant Industries has been effecting a transaction or transactions in which defendant Fund is a joint or a joint and several participant with Industries within the meaning of Section 17(d) of the Act and in contravention of Rule 17d-1 thereunder.

13. On March 27, 1968, a joint application was filed with the Commission by defendant Industries and by defendant Fund, seeking an order declaring that certain of their activities, including those set forth in paragraph 10 hereof, were not subject to Section 17(d) of the Act or Rule 17d-1 thereunder or in the alternative, seeking approval, *inter alia*, of those transactions.

14. On April 19, 1968, the Commission, passing upon the joint application, found that the program of defendant Industries and defendant Fund constituted a joint arrangement within the meaning of Section 17(d) of the Act and Rule 17d-1 thereunder; that Industries' acquisition of the shares of defendant General Time had been in violation of the Act; and the Commission refused to grant approval of the joint arrangement. A copy of the Commission's Memorandum Opinion and Order Denying Application (Investment Company Act Release No. 5358) is attached hereto as Exhibit A and made a part hereof.

15. In connection with the Annual Meeting of Shareholders of defendant General Time, scheduled to be held on April 22, 1968, defendant Industries supported a slate of nominees for directors (the Opposition Slate) in opposition to that proposed by the management of General Time and solicited proxies in favor of the Opposition Slate.

16. The Annual Meeting of Shareholders of defendant General Time was held on April 22, 1968, and the votes of its shareholders, including the votes of defendant Industries and defendant Fund, were cast either in person or by proxy. The meeting was adjourned, to be reconvened on May 3, 1968, when the count of the inspectors is scheduled to be presented.

17. Unless restrained and enjoined defendant Industries and defendant Fund will continue to engage in the unlawful acts and practices set forth in this complaint or obtain benefits from the unlawful acts and practices in which the Commission has found that they have been engaged.

WHEREFORE, the Securities and Exchange Commission, plaintiff herein, respectfully demands:

(1) That a temporary restraining order, preliminary injunction and permanent injunction be entered restraining and enjoining defendants Industries, Fund and Chestnutt and each of them, and their directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with them from directly or indirectly, acquiring, or participating in the acquisition of, any further shares of defendant General Time, or taking any other action, in any transaction in which the Fund is a joint or a joint and several participant with Industries, without first having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having first been granted by order of said Commission.

(2) That the temporary restraining order contain provisions restraining defendant General Time and its directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with it from directly or indirectly reconvening the Annual Meeting of Shareholders held on April 22, 1968, or in any manner giving effect to the votes of shareholders cast at such meeting, or holding any other meeting of shareholders of General Time until a preliminary injunction is entered.

(3) That the preliminary and permanent injunctions contain provisions

(a) requiring defendants Industries and Fund to withdraw any votes previously cast at the Annual Meeting of Shareholders of defendant General Time held on April 22, 1968, for shares which the Commission found Industries and Fund had acquired pursuant to a joint arrangement and enjoining Industries and Fund from

voting any such shares for nominees for directors whose names have been or may be proposed directly or indirectly by or on behalf of Industries or as supporting a merger or consolidation or other combination of General Time with Industries or from voting any such shares for any merger or consolidation or other combination of General Time with Industries at any future meeting of shareholders of General Time;

(b) enjoining defendant Industries from inducing defendant Fund or any other registered investment company of which it is an affiliated person, through such company's investment adviser or otherwise, from entering into any joint transaction with Industries in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(c) enjoining defendant Fund from entering into any other joint transaction with defendant Industries or any other affiliated person in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(d) enjoining defendant Chestnutt from advising, aiding or abetting the defendant Fund or any other registered investment company as to which Chestnutt is an investment adviser to engage in any joint transaction with any affiliated company in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(e) that should the order of the Commission, dated April 19, 1968, and attached hereto, be reversed or modified, appropriate modification of the preliminary and permanent injunctions will be made.

(4) Such other and further relief as the nature of the case may require and as the Court may deem proper.

Respectfully submitted,

.....

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May 1, 1968.

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION,

Defendants.

FINAL JUDGMENT OF PERMANENT INJUNCTION

This matter having come on for trial before me without a jury and this Court having issued a final judgment and order dismissing the complaint as to all defendants; and the Court of Appeals for the Second Circuit having on July 31, 1968 issued its opinion reversing the said judgment and directing this Court to proceed promptly to formulate an injunction consistent with its opinion, and the mandate of the said Court of Appeals having been transmitted to this Court on September 13, 1968;

Now, pursuant to said opinion and mandate of the Court of Appeals, this Court having requested and obtained suggestions and briefs from the parties concerning the proposed permanent injunction to be entered herein,

and upon all of the proceedings heretofore had and due deliberation having been had thereon, it is hereby

ORDERED, ADJUDGED AND DECREED that, unless and until an application pursuant to Section 17(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1 first has been filed with and has been granted by an order of the Securities and Exchange Commission ("Commission"):

1. Defendants Talley Industries, Inc. ("Talley"), American Investors Fund, Inc. ("the Fund"), and Chestnutt Corporation ("Chestnutt"), and each of them, and their directors, officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them be and they hereby are permanently enjoined from directly or indirectly acquiring, or participating in the acquisition of, any further shares of stock of defendant General Time Corporation ("General Time"), or taking any other action in any transaction in which the Fund is a joint or a joint and several participant with Talley;

2a. Talley and the Fund be and they hereby are required to withdraw any votes previously cast at the Annual Meeting of Shareholders of General Time held on April 22, 1968 for shares of General Time purchased or otherwise acquired by Talley or the Fund between December 26, 1967 and April 22, 1968;

2b. Talley and the Fund be and they hereby are permanently enjoined from voting at any time any such shares for nominees or directors whose names have been or may be proposed directly or indirectly by or on behalf of Talley;

2c. Talley and the Fund be and they hereby are permanently enjoined from voting at any time any such shares for acquisition of General Time by Talley or any merger or consolidation or other combination of General Time with Talley;

3. Talley and its directors, officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be and they hereby are permanently enjoined from inducing the Fund, or any other registered investment company of which it is an affiliated person, through such company's investment adviser or otherwise, to enter into any transaction in which it is a joint or a joint and several participant with Talley;

4. The Fund be and it hereby is permanently enjoined from entering into any other transaction in which it is a joint or a joint and several participant with Talley or with any other affiliated person;

5. Chestnutt be and it hereby is permanently enjoined from aiding or abetting the Fund or any other registered investment company as to which Chestnutt is an investment adviser in any transaction in which such registered investment company is a joint or a joint and several participant with any affiliated person;

6. Talley and the Fund be and they hereby are permanently enjoined from transferring or otherwise disposing of any of their shares of General Time stock purchased or otherwise acquired by Talley or the Fund between December 26, 1967 and April 22, 1968, or any securities held in lieu thereof as a result of any issue of securities in exchange for shares of General Time stock outstanding at the date of this order, so long as (1) Talley is an affiliated person of the Fund and (2) both the Fund and

Talley, directly or indirectly, own, either of record or beneficially, or control or hold with power to vote, any such shares;

All of the words and terms used in this order, including the term "affiliated person," are to be construed as defined in the Investment Company Act of 1940.

Dated: New York, New York
September , 1968

.....
United States District Judge

JUDGMENT ENTERED

.....
Clerk

Exhibit C

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, and GENERAL TIME CORPORATION,

Defendants.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS PROPOSED FINAL JUDGMENT OF PERMANENT INJUNCTION

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STATEMENT

On May 1, 1968, the Commission instituted an injunction action in this Court, among other things, to compel Talley Industries, Inc. ("Talley") and American Investors Fund, Inc. ("the Fund") to withdraw the votes they had cast at a meeting of the shareholders of General Time Corporation ("General Time") in support of Talley's attempt to take over General Time, because they had acquired General Time shares, so voted, in violation of Section 17(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1. On July 31, 1968, the Court of Appeals for the Second Circuit reversed the dismissal by this Court of the Commission's complaint and upheld the Commission's finding [1] that Talley and the Fund had violated the Act. The Court of Appeals directed this Court to proceed promptly to formulate an injunction consistent with its opinion.

Submitted herewith is a proposed final judgment of permanent injunction. The proposed injunction generally

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[1] Memorandum Opinion and Order Denying Application, *In re Talley Industries, Inc.*, Investment Company Act Release No. 5358, April 19, 1968.

directs the relief requested in the Commission's complaint. The proposed injunction enjoins the defendants from further or future violations of Section 17(d) and Rule 17d-1. It also provides that, unless and until application first has been filed with and granted by an order of the Commission, as to such shares of General Time already acquired by Talley and the Fund in violation of the Act, Talley and the Fund are required to withdraw their previous votes at the April 22, 1968 General Time shareholders' meeting and may not vote such shares in connection with any attempted takeover of General Time. In addition, until a Commission order is obtained, Talley and the Fund may not acquire any additional General Time shares nor may they sell or dispose of any General Time shares or any securities held in lieu thereof.

In its Post Trial Brief (pp. 32 *et seq.*), the Commission discussed the power of this Court to grant the relief sought in the Commission's complaint and reasons for the necessity to prevent the voting of the illegally acquired General Time shares. In order not to burden this Court unduly, material contained in the post-trial brief will not be repeated here, but the following will be supplemental to that material.

In fashioning relief, it is appropriate that this Court bear in mind that the Court of Appeals expressly stated that "... we do not undertake to particularize the form of a decree ..." (slip op. p. 3,345). This in part is a reflection of the fact that the briefing and oral argument by the Commission and the other parties in connection with the appeal centered principally on the Commission's attempt to reinstate its complaint which had been dismissed by this Court, and to achieve a decision on the merits that Talley and the Fund had been involved in a transaction which required compliance with the Investment Company Act. Accordingly, Judge Friendly's noting that "as at present

advised'' he did not see how the interests of shareholders could be advanced by provisions requiring Talley and the Fund to withdraw votes cast at the April 22 General Time shareholders' meeting and enjoining further voting by them, does not, in our view, connote any rejection of that type of relief but appears, rather, to invite a discussion and determination by this Court as to the propriety of such relief.

ARGUMENT

I. Unless Undertaken With Approval of the Commission, All the Activities of Talley and the Fund Looking Towards the Attempted Takeover of General Time Constitute Continuing Violations of the Act.

A decree such as we propose, which prohibits Talley and the Fund from ''taking over'' General Time without approval by the Commission, is necessary to stop a continuing violation of Section 17(d).[2] While the Court of Appeals did not delineate the exact scope of the ''transaction'' which it found to have been entered into in violation of Section 17(d) because the required approval of the Commission had not been obtained, it seems reasonably clear, not only from the opinion of the Court of Appeals (slip op., p. 3,342) but from the record, that this involved more than the mere purchase of General Time stock by Talley and the Fund at or about the same time. Rather, Talley and the Fund entered into a ''combination'' for the purpose of accomplishing a takeover of General Time (*id.*). The admitted

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[2] As noted, *all* of the prohibitions in the proposed injunction are subject to an order of the Commission which may permit such otherwise proscribed activity. That is, the Commission, in an order under Section 17(d) and Rule 17d-1, or under other appropriate sections or rules, may permit, for example, voting of the shares, acquisition of additional General Time shares, sale or other disposition of the shares, etc.

objective of Talley was to bring about a merger with General Time (*id.* at 3,332). The objective of the Fund was also to bring about a merger of General Time, either with Talley or perhaps with some other company if such a company made an offer which Talley did not choose to meet.[3] It was with this objective that the Fund made an investment which clearly departed from its usual investment practices, if not from its stated investment policies.[4]

Once it is recognized that the transaction involves more than the mere purchase of stock, it is clear that, short of ordering divestiture of the stock, an injunction against consummation of the takeover without Commission approval is the only way to prevent a continuing violation. Section 17(d) of the Act and Rule 17d-1 thereunder, which rule has been held valid by the Court of Appeals, required Commission approval of the entire transaction, not merely of a part of it. Had Talley and the Fund applied to the Commission for approval of the transaction before initiating it, the Commission, had it approved the acquisition of the stock, would have retained continuing jurisdiction over further steps in the transaction, including the takeover itself. The fact that Talley and the Fund initiated the transaction without seeking such approval, and then, after the Commission had issued its order declining to approve the transaction, chose to ignore that order[5] and

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[3] Pages 30-31 of the transcript of testimony of George A. Chestnutt, Jr., before the Commission.

[4] *Id.*

[5] We recognize that Talley and the Fund believed that the Commission's order was erroneous, both on the law and on the facts. This belief, however, did not entitle them to ignore the order; their remedy, rather, was to seek judicial review, to which they were entitled, and to refrain from consummating the trans-

(*Footnote continued on following page*)

proceed with the transaction, does not deprive the Commission of continuing jurisdiction with respect to it.

The Court of Appeals left open the question of the appropriate relief in this case. It considered what would be the appropriate remedy in a court of equity for a past violation which was purely a matter of history in order to prevent the recurrence of violations in the future and suggested that for this purpose an injunction against the take over might be unduly "drastic." With all deference to the Court of Appeals, this overlooks the need for such a decree to stop the continuing violation.[6] Furthermore, since Rule 17d-1, which the Court of Appeals found to be a valid exercise of the Commission's authority under the Act, makes it unlawful to engage or participate in a joint transaction without Commission approval, it is respectfully submitted that it is for the Commission, rather than for this Court, to determine whether such transaction, or any aspect of it, should be approved. Consequently, for this Court to determine whether or not Talley and the Fund should be permitted to take over General Time with-

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(*Footnote continued from preceding page*)

action until it was either approved by the Commission or the Commission's order was set aside by a court. See *United States* v. *United Mine Workers*, 330 U. S. 258 (1947). In any event, however, now that the Court of Appeals has, in effect, upheld the Commission's order, this Court should not sanction their continuing disregard of it.

[6] This oversight is understandable in view of the fact that this Court never reached the question of the appropriate remedy, and, as we noted, *supra* p. 2, in the Court of Appeals the primary, if not the exclusive, attention of the parties was devoted to the issue of whether there was any "joint transaction" anywhere in the picture and to the issue of whether the Commission's Rule 17d-1 was valid. The Court of Appeals accordingly found it unnecessary to determine what the scope of the joint transaction was, once it had found that such a transaction existed.

out the approval of the Commission would be, in the words of the Supreme Court, "an unwarranted incursion into the administrative domain." *Securities and Exchange Commission* v. *New England Electric System,* 390 U. S. 207, 211 (1968).

If this Court conditions consummation of the transaction upon Commission approval, as required by the rule, certain evidentiary and procedural questions which have been a source of some recent concern in this proceeding will be elimated. If Talley and the Fund apply for Commission approval of the takeover, they would be entitled to attempt to demonstrate that refusal by the Commission to permit the takeover would work substantial hardship on their shareholders. General Time will be entitled to participate before the Commission in accordance with the Commission's Rules of Practice and to elicit any relevant evidence with respect to whether or not consummation of the takeover will be in the interest of the Fund's shareholders or otherwise permissible under the standards outlined in Rule 17d-1. If the Commission should deny any application in this regard by Talley and the Fund, they would of course be entitled to judicial review under the Act. Thus, the question of whether or not the takeover should be consummated will be determined, in the first instance, by the Commission in the exercise of its authority and responsibility under the Act, subject to judicial review.

II. Even Should This Court Narrowly Construe the Joint Transaction as Being Limited to the Acquisition of the General Time Stock, and Not Consider the Activities Related to the Takeover Attempt as Constituting a Continuing Violation of the Act, the Relief Requested by the Commission Nonetheless Should be Granted.

The Court of Appeals held that Talley and the Fund, as the Commission had alleged in its complaint, had violated the Investment Company Act by not having first sought and obtained an order of the Commission permitting those companies to acquire the General Time stock. The avowed purpose of the acquisition of General Time stock was to enable Talley to mount an attempted takeover of General Time. We respectfully submit that, should this court merely enjoin any possible future violation of Section 17(d) without, at the same time, preventing Talley and the Fund from voting the shares towards an acquisition of or merger with General Time, the unlawful course of conduct would be in effect condoned in that the wrongdoers would be permitted to retain the fruits of their wrong.

The continued efficacy of enforcement by government regulatory agencies of the statutes administered by them requires relief from the courts, which, in addition to providing justice in particular cases involved, seeks effectively to deter similar future violations. For these reasons, this Court should take steps to prevent the fruition of the goal to which the illegal activities were aimed, at least where it cannot be demonstrated that precluding defendants from obtaining their goal will injure those the statute seeks to protect. The determination should be made by the Commission. It cannot be assumed that a refusal to permit the takeover here will work any particular harm to the shareholders of Talley or of the

Fund, whether Talley and the Fund may continue to hold their shares of General Time stock as an investment (which is in accord with the objectives of the Fund) or should dispose of part or all of their holdings pursuant to an order of the Commission. The risk of the market—that the price of stock may go down as well as up—is inherent in any purchase of stock and does not in any way particularly flow from the circumstances here.[7] Should stockholders of either company deem themselves damaged by such restrictions on their companies' holdings of General Time stock as may be decreed by this Court, the stockholders may be able to seek redress against those individuals directly responsible for violation prompting such relief.

The considerations militating in favor of granting the relief requested are supported by judicial precedent. The United States Supreme Court has recognized, as factors to be weighed by district courts when fashioning equitable relief, that a wrongdoer should not be permitted to retain the fruit of his unlawful acts and that the relief should provide an efficacious deterrent to future violations of the statute involved. In *Schine Theatres* v. *United States*, 334 U. S. 110 (1948), the United States brought suit under Sections 1 and 2 of the Sherman Act, 15 U. S. C. 1 and 2, seeking an injunction against continued violations and divestiture of Schine's illegally obtained theatres, even though the Sherman Act did not specifically provide for divestiture. In granting the relief, the Court noted:

> In this type of case we start from the premise that an injunction against future violations is not ade-

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[7] It should be noted that the proposed prohibition against voting the shares for acquisition of General Time applies only to Talley and the Fund and would not follow the General Time shares into the hands of any purchaser.

> quate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees. [Citation omitted]
>
> To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the anti-trust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project. *Id.* at 128.

In *Securities and Exchange Commission* v. *Quing N. Wong,* 252 F. Supp. 608 (D. P.R., 1966), the Commission alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, and Sections 17(a), 17(d), and 37 of the Investment Company Act of 1940, 15 U. S. C. 80a-17(a), 80a-17(d) and 80a-36. In addition to an injunction, the Commission requested that the court compel the defendants to make restitution to the investment company. In rejecting one defendant's contention that it was improper for the Commission to seek restitution, the court (p. 614) quoted from *Schine* v. *United States, supra,* emphasizing that complete and effective relief required depriving the wrongdoer of his unlawfully-attained gain.

The Supreme Court has recognized that where the courts must make a choice between protecting private interests from injury and the enforcement of a statute, that " . . . courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326 (1961). In that case a civil antitrust proceeding, the Supreme Court directed the entry of a decree requiring du Pont to divest itself completely of the approximately 23% of the common stock of General Motors Corporation which, the Court held, tended towards a monopoly in violation of Section 7 of the Clayton Act, 15 U. S. C. 18. The Supreme Court rejected the objection of du Pont " . . . that the Government's plan of complete divestiture entailed harsh income-tax consequences for du Pont stockholders and, if adopted, would also threaten seriously to depress the market value of du Pont and General Motors stock" (*id.* at 320). Du Pont had proposed, in lieu of divestiture, that it would retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, but that it would "pass through" the right to vote the General Motors stock to du Pont's shareholders proportionally to their holdings of du Pont's own shares (*id.* at 320). Du Pont alternatively agreed that it would be willing to have all of its General Motors stock be disenfranchised, if that would satisfy the requirement of effective relief (*id.* at 333). The Supreme Court impliedly was critical of the district court because " . . . the record is concerned mainly with the alleged adverse tax and market effects of the Government's proposal for complete divestiture" (*id.* at 325). The "primary focus of inquiry," said the Court, should have been on the question of the relief required in view of the violation of the statute. The Court said " . . . the suit has been a futile exercise if the Government proves a violation

but fails to secure a remedy adequate to redress it" (*id.* at 323). The Supreme Court agreed that complete divestiture by du Pont of the General Motors stock was required, as urged by the Government, and that restrictions on voting power were not sufficient. But it indicated that the same result would have followed even if the Court had been in doubt.

> "For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor" (id. at 334) [footnote omitted].[8]

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[8] In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189 (1944), defendants complained of the provisions in an anti-trust divestiture decree. In this connection, the Supreme Court stated:

> "It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive.
>
> * * *
>
> "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."

Conclusion

For the foregoing reasons the Court should enter the proposed Final Judgment of Permanent Injunction submitted herewith.

Respectfully submitted,

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